

CONSTITUTIONAL ISSUES RELATING TO THE PROPOSED GENOCIDE CONVENTION

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

CONSIDERING THE CONSTITUTIONAL IMPLICATIONS OF THE PROPOSED
GENOCIDE CONVENTION

FEBRUARY 26, 1985

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CONSTITUTIONAL ISSUES RELATING TO THE PROPOSED GENOCIDE CONVENTION

TUESDAY, FEBRUARY 26, 1985

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 226 of the Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Grassley.

Staff present: Stephen J. Markman, chief counsel; Randall Rader, general counsel; Michael Loyd Chadwick, professional staff; Susan Bourne, clerk; Diane Stark, clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. We are happy to welcome each of you here today. The Subcommittee on the Constitution is about to consider the constitutional implications of the proposed Genocide Convention. The American people expect the Senate to carefully examine any treaty before they adopt a resolution of ratification to ensure that it accords with the provisions of the U.S. Constitution.

In the words of George Washington, "It is important * * * that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres. * * *"

The Genocide Convention was adopted by the U.N. General Assembly on December 10, 1948, and submitted by President Harry S. Truman to the Senate for its "advice and consent" on June 16, 1949. Three months later, the American Bar Association's house of delegates convened on September 8, 1949 and issued the following resolutions:

Be it * * * Resolved, That the suppression and punishment of genocide under an international convention to which it is proposed the United States shall be a party involves important constitutional questions; that the proposed Convention raises important fundamental questions but does not resolve them in a manner consistent with our form of government.

Therefore, be it resolved, that the Convention on Genocide now before the United States Senate be not approved as submitted.

The American Bar Association also released a special report prepared by its Special Committee on Peace and Law through the United Nations. It began with these words:

At a time in the history of the world when economic conditions, resulting largely from two devastating wars, are forcing nations to demand sacrifices of their individual freedoms to conform to Socialist states or alien ideologies, the same peoples are being asked to adjust themselves to revolutionary changes in their relations with their own people and the people of other nations. It does not seem to be enough that they should be led by example and teaching to new ways of conduct. Under international codes of conduct called treaties, they are to accept the changes by law. Government by treaties is the new concept.

Four months after the American Bar Association's special committee released its report, the Senate Foreign Relations Committee conducted 5 days of hearings through a subcommittee, which reported to the full committee that the Senate should not ratify the Convention unless four understandings and one declaration were adopted. The full committee declined to send the Convention to the Senate floor for a vote.

After laying idle on the Executive Calendar under the Eisenhower, Kennedy, and Johnson administrations, President Nixon resurrected the Convention and sent it to the Senate for ratification. Hearings were held in 1970 and again in 1971 by the Senate Foreign Relations Committee.

In 1973, the committee approved the Convention with three understandings and one declaration. It was later debated on the Senate floor, but failed to pass. The Convention then returned once again to the Executive Calendar.

Even though the American Bar Association had opposed ratification in the 1950 and 1971 hearings, in 1976 the ABA's house of delegates passed a resolution favoring ratification, containing reservations and declarations approved by the Foreign Relations Committee.

A year later, President Jimmy Carter recommended that the Senate ratify the Convention and hearings were held, but the Convention never reached the floor. In 1981, a public hearing was held on the Convention, but it was not reported out of committee.

Three years later, President Ronald Reagan, acting on the advice of the State Department, announced that his administration would "vigorously support, consistent with the U.S. Constitution the ratification of the Genocide Convention." Then, on October 10, 1984, the Convention was brought before the Senate for its consideration and, after a short debate, it was withdrawn.

As you can see, the Genocide Convention has been under consideration for 35 years. The main problem centers around two competing issues—our revulsion over the crime of genocide and our obligation to protect the sovereignty of the U.S. Constitution. While it is time to resolve these issues, we must not compromise our constitutional form of government in the process. Participation in world affairs need not, and should not, result in any diminution of liberty in the United States.

In an endeavor to examine the constitutional questions relating to the Genocide Convention, four distinguished legal scholars have accepted our invitation to testify before this subcommittee today and address the following six questions:

First, should the treaty-making power be used as the basis for enactment of domestic legislation in the United States?

Second, would the Genocide Convention alter the balance of authority between the States and the Federal Government by making genocide an international and Federal crime?

Third, does the Convention violate specific amendments to the Convention?

Fourth, does ratification of the Convention limit our national sovereignty?

Fifth, does the Convention mandate changes in the independence of the American legal system?

Sixth, what amendments, reservations, declarations, or understandings should be attached to the Genocide Convention?

I would like to express my sincere appreciation to Professors Friedlander, Murphy, de Seife, and Moore for the time and effort which they have extended in preparation of their opening remarks and testimonies. Each of them will, no doubt, enlighten this subcommittee with their insightful comments.

I would also like to express my appreciation to Senator Lugar and the staff of the Committee on Foreign Relations for their assistance in preparation for this hearing this morning.

While there may be some who disagree with the holding of these hearings today, I am sure several hundred law students are quite happy that their classes have been canceled.

I will place in the record at this point a statement by Senator Strom Thurmond.

[The prepared statement of Senator Thurmond follows:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Mr. Chairman, this morning the Subcommittee on the Constitution meets for the first time during the 99th Congress. I want to take this opportunity to congratulate you, Mr. Chairman, for the outstanding leadership you have provided in addressing the important issues that are dealt with by this Subcommittee. I look forward to working with you during the 99th Congress.

I also want to commend you for holding this hearing to consider the constitutional issues that relate to the proposed Genocide Treaty. This Treaty has been before the Senate for consideration for more than 35 years. In my view, that is long enough—the issue has already been effectively resolved and year after year wastes the time of this institution to no good purpose whatsoever.

However, so long as the Treaty remains before the Senate for consideration and so long as its ratification is actively pursued, it is appropriate that we continue to discuss and develop the concerns that have been expressed about the treaty for many years.

Many of those concerns relate to the constitutional implications of the treaty and the effects that its ratification would have on our system of government. As one who has opposed the ratification of the Genocide Treaty, in part because of concerns about the negative impact that it will have on our domestic law, I look forward to today's discussion.

Mr. Chairman, I am confident that virtually all Americans abhor even the thought of genocide. We need not sign a piece of paper for the world to know that. Every thoughtful American should, therefore, analyze the actual effect that the Convention would have within the United States if the Senate makes the error of consenting to its ratification.

We have a distinguished group of witnesses with us today, and I look forward to their testimony.

Senator HATCH. Our first witness this morning is John Norton Moore, director of the Centers for Ocean Law and Policy and National Security at the University of Virginia School of Law. A former counselor on international law to the Department of State,

he is currently chairman of the American Bar Association Standing Committee on Law and National Security. Recently, Professor Moore served as a special counsel for the United States in the Nicaragua case before the International Court of Justice.

He is the author of five books and numerous articles.

We will turn the time over to you, Professor Moore.

STATEMENT OF JOHN NORTON MOORE, WALTER L. BROWN PROFESSOR OF LAW AND DIRECTOR, CENTER FOR LAW AND NATIONAL SECURITY, UNIVERSITY OF VIRGINIA

Professor MOORE. Thank you, Mr. Chairman.

With your permission, I would like to place in the record my prepared remarks as well as a pamphlet entitled "Genocide" done by the educational Conflict Analysis Center and speak briefly to four points.

Senator HATCH. Without objection, we will put that all in the record.

Professor MOORE. This morning I would like to make four points about the Genocide Convention in support of Senate advice and consent. The first of those is ratification of the Genocide Convention is in the national security and foreign policy interest of the United States. It is in our interest because ratification will enable the United States to more clearly focus attention on contemporary totalitarian genocide as for example in the Khmer Rouge attack on the Cham in Cambodia and the Sandinista attack on the Miskito Indians in Nicaragua. Sadly, Mr. Chairman, we live in a dangerous world in which totalitarian regimes pursuing grotesque ideologies still engage in genocide.

It is in our interest because ratification will remove a propaganda theme available to totalitarian regimes in response to United States pressure to improve human rights. The Soviet Union has sought during the Helsinki talks, for example, to deflect attention from its own human rights abuses by asking why the United States has never ratified the Genocide Convention. I think the quotation from our ambassador to the CSEC talks, Ambassador Max Kampelman, says it very well:

It would be extremely helpful to the United States internationally were we to ratify the Genocide Convention. It is ludicrous to provide the Soviet Union with a club with which to attack us, particularly since we abide by the Convention's provisions even without ratification, while the Soviets, who have ratified it, come close to violating its provisions.

Mr. Chairman, it is in our interest because ratification will clarify for the United States the definition of genocide and more easily enable the United States to rebut false charges and disinformation with respect to the actions of the democracies and their allies. I think we should keep in mind in this connection that the restatement of the Foreign Relations law of the United States already makes it clear that genocide is an international crime under customary international law binding on the United States. Since suit thus can be undertaken pursuant to the U.S. acceptance of the jurisdiction of the International Court of Justice under the optional clause as some kind of propaganda action against the United States, we are already subject to that kind of action before the ICJ and ratification would clarify the definition of genocide and make

even easier rebuttal of any grotesque disinformation charge that might be made against us.

In addition, ratification would restore U.S. leadership in the continuing effort to end the horror of genocide. In this respect, I would like simply to quote a statement made by former Secretary of State Dean Rusk in his testimony in 1950:

We all know too well that millions of human beings are still subjected to the domination of ruthless totalitarian regimes and that the specter of genocide still haunts mankind. It should be made clear to such governments that the United States and other civilized countries do not condone such conduct any more than in the past.

The second point I would like to make this morning, Mr. Chairman, is that quite simply there are no constitutional or other legal impediments to Senate advice and consent to ratification of the Genocide Convention. This treaty is clearly and validly within the treaty power. In a long line of Supreme Court cases from the *Geofroy v. Riggs* case back in 1890 down until the present, it has been clearly established that the treaty power is broad enough to cover all subjects that properly pertain to our foreign relations. I think there can be simply no question that this is one of those subjects in view of the fact that twice it has been unanimously approved by the U.N. General Assembly as a crime against international law. I might add, Mr. Chairman, that those votes took place not in the current U.N. General Assembly, but back in 1946 and 1948 when there was in fact something we spoke of then as the automatic majority for the United States. In addition to that, the London Charter of the Allied Powers establishing the Nuremberg tribunal clearly indicated this was a matter of international concern. We know that it is a subject that creates, when the horror takes place, many refugees internationally. We know that it is frequently associated with radical-regime syndrome totalitarian states and frequently leads to serious conflict. So there is no question that this is clearly an issue subject to the proper exercise of the treaty-making power.

In addition to that, the *Reid v. Covert* case held in 1957 that should there be a conflict with the U.S. Constitution, it is happily the Constitution that prevails.

So there can in the end not be any kind of ultimate conflict because the Constitution of the United States would prevail. It could in no sense be set aside by this or any other treaty or executive agreement the United States might enter into.

In addition, I think we should point out that this particular treaty is clearly non-self-executing. That is, you would have no effect in the domestic courts of the United States apart from implementing legislation that this committee and the overall U.S. Congress would have to enact.

So, this is not one of those cases where we need worry about vague language, whether it is self-executing or not. We know it is clearly not from the language of articles V and VII and the declaration that the administration has submitted. So this is one of those cases not presenting us with the kinds of problems that were argued, for example, at the time of the Bricker amendment debate. In addition, this is a setting in which there is clear Federal authority already to undertake legislation dealing with defining international crime. Thus, this is not an area in which in any respect this

treaty would add powers to the Federal Government that it would not have in the absence of a treaty?

Now the third point I would like to make this morning, Mr. Chairman, is that much of the early debate about the Genocide Convention involved issues or constitutional uncertainties that have now been definitively resolved by the 1957 *Reid v. Covert* case, after the initial confusion about whether a treaty might be able to set aside the U.S. Constitution. Up until that time, there had been no definitive Supreme Court decision deciding that issue, though frankly I think the dictum of the Supreme Court was reasonably clear to that effect prior to that. So, that has been a fundamental clarification that tells us now we are not at risk in this particular kind of setting.

In addition, we now know much more about the kinds of treaties that are self-executing than we did in the early days of the debate. We know that a treaty is not self-executing unless the congressional intent is clear to make the treaty self-executing.

Finally, Mr. Chairman, I would like to turn to my fourth and final point, and that is to discuss considerations with respect to whether the United States should have a reservation concerning article IX of the convention referring disputes to the International Court of Justice.

I take it for granted that the three understandings and one declaration supported by the administration at submittal make excellent sense and are noncontroversial, but this article IX is an issue I have heard raised.

Let me say first on the side of arguing that there ought to be a reservation that I understand concern about propaganda cases and politicized decisions following the Nicaragua case. In my opinion, that was extraordinarily misinformed decision to bring an upside down case to halt a defensive response against an ongoing armed attack. In my judgment, the Court makes a serious error in this case with respect to its assertion of authority and its power in taking the case and, as one who participated in that case on behalf of the U.S. Government, Mr. Chairman, let me say that I understand full well concerns that some may have with respect to overreaching and politicized efforts before the Court.

Having said that, Mr. Chairman, I conclude it is nevertheless in the interest of the United States not to have a reservation to article IX. I think there are four important reasons why we should not. First, acceptance of the compulsory jurisdiction in this treaty narrows U. S. liability under customary law. It does not expand it. It narrows it, and what we are doing by not accepting the jurisdiction of the Court here is continuing to accept the jurisdiction under the vague customary law standard without the clarifying understandings of the United States.

Second, nonacceptance limits our ability to enforce against grotesque totalitarian behavior elsewhere. This is similar really to the effort of the United States to have these clauses in terrorism treaties such as the Montreal treaties on aviation or the treaty for protection of diplomats that enabled the United States to take Iran to the International Court of Justice. It did not solve the problem for us but it helped to get the definitive judgment of the Court. In my judgment, the issue ought to be looked at seriously, for instance, by

bringing a case against the Sandinista leadership for genocide of the Miskito Indians. That is an option clearly not open to the United States if we did not accept this provision.

Third, nonacceptance will cast doubt on whether the United States has accepted the treaty. Two of our closest allies in NATO, The Netherlands and the United Kingdom, have both said in reaction to Soviet bloc reservations to article IX that they do not regard that reservation as consistent with the object and purpose of this treaty. That simply means in legalese they do not regard the Soviet bloc as having accepted the treaty as far as The Netherlands and UK are concerned. That means it will cast doubt on the ability of the United States to have in fact legally ratified it and concluded this agreement.

Finally, Mr. Chairman, I believe nonacceptance of article IX would put the United States in the same moral position as that of the Soviet bloc which I think has something very genuine to fear from a Genocide Convention. Out of the 15 nations that have reserved on article IX, nine are members of the Soviet bloc or Communist nations. Unlike the totalitarian nations the democracies are not about to commit genocide.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Moore and responses to written questions follow:]

PREPARED STATEMENT OF JOHN NORTON MOORE

Mr. Chairman and Members of the Committee:

It is a privilege and a pleasure to testify before this Subcommittee in support of Senate advice and consent to ratification of the Convention on the Prevention and Punishment of the Crime of Genocide as recommended by President Reagan and six previous American presidents of both parties. This Committee is to be commended for holding hearings that will put to rest any lingering constitutional doubts with respect to United States accession to the Convention.

CONTEXT OF THE CONVENTION

These hearings will focus on national constitutional issues in United States accession. Before turning to these issues, however, it is important to place the decision on Senate advice and consent in perspective.

Americans can be proud that their nation has played a leading role in encouraging human rights in a world far too often violative of such rights. One of the most elemental of such rights is the right of an entire national, ethnic, racial or religious group not to be exterminated through mass murder. Following the Holocaust the United States took the lead within the United Nations system to stamp as criminal such incidents that had indelibly stained the conscience of mankind. Pursuant to this initiative the Genocide Convention was approved in 1948 and signed by the United States, signifying our intent to ratify. To date it has been ratified by more than 90 countries including almost all of our allies. Sadly, we are not yet among them.

It is in the clearest moral, foreign policy and national security interests of the United States to ratify this treaty without delay. Specifically:

- o ratification will restore United States leadership in

the continuing effort to end the horror of genocide. United States accession is "a statement of conscience" for a free democratic peoples whose government is founded on the conviction that all men are created equal. The Convention is, at minimum, an important symbolic statement against genocide;

- o ratification will remove a propaganda theme available to totalitarian regimes in response to United States pressure to improve human rights. The Soviet Union has sought during the Helsinki talks and elsewhere to deflect attention from its own human rights abuses by asking why the United States has never ratified the Genocide Convention. As Ambassador Max Kampelman has said: "It would be extremely helpful to the United States internationally were we to ratify the Genocide Convention. It is ludicrous to provide the Soviet Union with a club with which to attack us, particularly since we abide by the Convention's provisions even without ratification, while the Soviets, who have ratified it, come close to violating its provisions.";
- o ratification will enable the United States to more clearly focus international attention on contemporary totalitarian genocide, as in the Khmer Rouge attack on the Cham in Cambodia, and the Sandinista attack on the Miskito Indians in Nicaragua; and
- o ratification will clarify for the United States the definition of genocide and more easily enable the United States to rebut false charges and disinformation with respect to actions of the democracies and their allies. In this connection it should be clearly understood -- as the Restatement of the Foreign Relations Law of the United States makes clear -- that genocide is already a crime under customary international law and under Article 56 of the United

Nations Charter binding on the United States. Indeed, under United States acceptance of the compulsory jurisdiction of the International Court of Justice, a propaganda case of "genocide" can already be filed against the United States in the World Court much as Nicaragua has filed an upside down case against us in Central America. Ratification of the treaty will clarify the definition of genocide for the United States and make even easier rebuttal of grotesque disinformation charges by those who would mask their own human rights abuses and debase the real meaning of genocide.

THE CONSTITUTIONAL ISSUES

There are no national constitutional impediments to United States accession to the Genocide Convention. That is a conclusion supported by the American Bar Association, the highest representative body of the organized bar in the United States, as well as by me and the overwhelming number of constitutional scholars in the United States.

The Genocide Convention is unquestionably a proper subject for exercise of the treaty power. Genocide has been repeatedly associated with aggressive war and totalitarian state behavior in the twentieth century, was a subject of Allied concerns in the London Charter establishing the Nuremberg trials after World War II, and has now been the subject of a treaty accepted by over 90 nations. ~~As such,~~ it is beyond any doubt an appropriate foreign policy subject within the treaty power.

The Genocide Convention does not, cannot, and will not violate any provision of the United States Constitution. First, the United Nations Committee that drafted the Convention was chaired by the United States delegate John Maktos and the Convention was drafted specifically to "avoid constitutional

problems for the United States. Second, Article V of the Convention makes clear that the implementing obligation is an obligation "in accordance with their respective Constitutions." Thus, American implementing legislation need only be drafted consistent with our Constitution. Third, under the clear constitutional doctrine of Reid v. Covert, 354 U.S. 1, 17 (1957), any treaty provision inconsistent with the United States Constitution would simply be invalid under national law. And finally, there will be no unconstitutional implementation of this Convention because the Reagan Administration has properly endorsed a United States declaration that we will not deposit an instrument of ratification until after implementing legislation has been enacted in the United States. Thus, any such implementing legislation will, as a precondition to United States accession to the Convention, be approved by the members of the Senate Judiciary Committee and the Congress. I do not believe that the constitutional experts of this Committee will agree to any unconstitutional legislation. Nor does the Genocide Convention present any serious constitutional issue for domestic implementing legislation.

RESPONSES TO COMMONLY ASKED CONSTITUTIONAL QUESTIONS
CONCERNING THE GENOCIDE CONVENTION

1. Should the treaty making power be used as a basis for enactment of domestic legislation in the United States?

Not if there is no legitimate underlying foreign policy interest in the subject matter of a treaty in question. But with respect to the Genocide Convention there is such an interest beyond any doubt. Where there is such an interest, as here, it is inconceivable that the treaty power not be available as a basis for enactment of domestic legislation. If it were not we would have no systematic basis on which to conform United States conduct with our treaty obligations and the United States would

be severely crippled in its foreign policy. Indeed, one of the foremost deficiencies of our government under the Articles of Confederation was a weak treaty power and the Framers wisely remedied that problem.

Let me give an example of why, on a subject genuinely relevant to foreign policy, a treaty -- read with the necessary and proper clause -- must be considered a basis for domestic legislation. Without this authority Congress would be in the untenable position, for instance, of ratifying the 1979 International Convention Against the Taking of Hostages, and then having no authority to pass domestic criminal laws defining and penalizing the taking of hostages in the United States. Thus, when Congress enacted and the President signed legislation last fall to implement that international hostage-taking convention, the Administration described the last section of the bill -- providing that the legislation would not become effective until the Convention comes into effect for the United States -- as necessary because, "much of the authority of Congress to prohibit hostage-taking flows from the Convention and the purpose of this act is to implement it."

In any event any theoretical difficulty as to whether a particular subject matter is one genuinely relevant to national foreign policy interests and thus presents a basis for enactment of domestic legislation solely on the treaty power is not an issue with the Genocide Convention. For unlike some possible subject matter, Congress has enumerated constitutional power to legislate under Article I Section 8 of the Constitution for precisely this case; that is "to define and punish...offences against the Law of Nations..." That is precisely what genocide is and thus Congress has clear independent power to legislate to define and deal with Genocide quite apart from any basis in the treaty power.

2. Would the Genocide Convention alter the balance of authority between the states and the federal government by making genocide an international and federal crime?

No. As we have seen, Congress already has clear authority to legislate under Article I Section 8 of the Constitution with respect to crimes against the law of nations. Thus, the Convention will not in fact provide Congress -- and the federal government -- any authority it does not already possess. Moreover, genocide is already an international crime and as such Congress will be exercising an important responsibility in clarifying that crime pursuant to the Convention text and the suggested United States understandings.

After considering various drafts of what ultimately became Clause 10, our constitutional framers decided that it would be virtually impossible to clearly define in the Constitution itself "offenses against the law of nations" so the language of Clause 10 was amended to explicitly give Congress the authority to "define" the various punishment of such crimes.

In one respect this question confuses the current debate by inferring that Congress, by its act of giving advice and consent to ratification of this treaty, "would make" genocide an international crime. Under generally accepted concepts of customary international law genocide is today an international crime and it certainly has been for Convention parties since the Convention entered into force on January 12, 1951. Consequently, United States citizens who are alleged to have committed the crime of genocide could theoretically be prosecuted now in the courts of a foreign country for the crime of genocide. And if the United States government is alleged to have committed genocide, even within the borders of the United States, our government now could theoretically be brought before the International Court of Justice.

In terms of the authority of the several states to either adopt legislation defining and punishing the crime of genocide

within that state, or the authority of that state to arrest and prosecute individuals for alleged commission of the crime of genocide pursuant to a federal criminal law which would flow from ratification of this Convention, the Genocide Convention would have no destabilizing affect. Such questions, in fact, do not even rise to the level of appropriate debate concerning the Convention itself, since they all are the subject of the specific provisions of implementing legislation which would be required to be enacted before the Convention is ratified by the United States. Such draft legislation in the past has provided, and one expects the ultimate legislation to provide, nonexclusive federal jurisdiction over the crime of genocide. State authority would not be preempted, except in so far as a state passed a law endeavoring to permit the commission of genocide within the state. Obviously, in this instance, such an hypothetical (and absurd) state law would be in conflict with a federal law under the supremacy clause and would as such, be invalid.

Finally, and simply stated, the Genocide Convention would not transfer jurisdiction over such crimes as homicide to the federal government from the authority of the several state governments anymore than it would transfer to the federal government exclusively the obligation to arrest and prosecute individuals alleged to have violated the federal law against murder, attempted murder or conspiracy to murder the President of the United States.

3. Does the Convention violate specific amendments to the Constitution?

No. As has been previously pointed out the Convention was drafted specifically to conform with the United States Constitution. The only provision of the Convention on which any constitutional doubts were raised in earlier drafts related to the "incitement to commit genocide" provision in Article III in relation to the First Amendment guarantee of freedom of expression. It is no accident that the current "incitement"

clause is constitutional. An early draft of Article III prohibited all forms of public propaganda encouraging genocide. At American insistence, this was revised into the present language specifically to accommodate the free speech protections of the United States Constitution. The First Amendment of the Constitution does not, of course, protect incitement to commit a crime. As Justice Brandeis warned in Whitney v. California, 274 U.S. 357, 375-376 (1927), "the wide divergence between advocacy and incitement...must be borne in mind." Advocacy is protected even if it expresses prejudice and hate; incitement to a crime is not. In Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), the Supreme Court reaffirmed this rule when it held that the constitutional guarantee of free speech covers "advocacy...of law violation," but does not protect "advocacy [which] is directed to inciting...lawless action."

It should also be remembered that the obligation under Article V of the Convention to enact domestic legislation that would make "incitement to commit genocide" a crime under national law is specifically qualified by the phrase "in accordance with their respective Constitutions." Moreover, under the doctrine of Reid v. Covert, as we have seen any treaty provision inconsistent with the Constitution would be invalid under national law.

Testifying in 1970 for the Department of Justice, then Assistant Attorney General William F. Rehnquist reported that freedom of speech as protected by the Constitution "could not be and ... would not be" affected in any way by the terms of the Genocide Convention. That conclusion is absolutely correct.

4. Does ratification of the Convention limit our national sovereignty?

All treaties create obligations binding on the United States under international law and as such to some extent limit our "sovereignty" and that of our treaty partners. As a criticism of

the Genocide Convention, however, this question conveys little meaning.

First, it is generally accepted American constitutional law that a later act of Congress clearly inconsistent with our treaty obligations will prevail under national law. Thus, if Congress subsequently were to seek to alter domestic implementing legislation in ways inconsistent with the treaty such alterations would be valid for purposes of domestic law. There is thus no loss of sovereignty to adopt national policies or laws binding domestically within the United States.

Second, because of the declaration to accompany ratification this Committee and Congress must first legislate domestic implementing legislation before the treaty can enter into force for the United States. That is hardly a renunciation of national sovereignty.

Third, the purpose of the Convention is to encourage nations not to commit genocide. The United States certainly has no intention ever to commit genocide. The real problem is controlling the behavior of totalitarian states that do have a propensity to genocide, as we have seen in the cases of Nazi Germany and the Khmer Rouge in Cambodia, among other examples. It is simply grotesque to seriously worry about the United States reserving the right to do what the Convention prohibits. The real concern is to effectively prevent totalitarian states from engaging in genocide by continuing to raise the costs of such behavior and clearly focusing on the insult to all humanity of such acts.

Fourth, genocide is already a crime under customary international law and Article 56 of the United Nations Charter and as such is binding on the United States in as realistic a sense as is the Genocide Convention. Thus, there is no new international obligation undertaken by the United States pursuant to this treaty. Rather we are ourselves shaping the obligation

by accepting the treaty and promulgating important understandings as suggested by the Reagan Administration.

Finally, Article XIV of the Convention contains a denunciation clause by which parties may terminate any legal obligations arising under the Convention within at least a five year period.

5. Does the Convention mandate changes in the independence of the American legal system?

No. The third understanding supported by the Reagan Administration makes clear that "nothing in Article VI shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state." This makes clear that American nationals may be tried in American courts and that there is no obligation to extradite an American national to a third country when trial is undertaken within the United States. That is, our own judicial system has priority for trial of American nationals.

There is no international criminal tribunal for trial of individuals accused of genocide and no reasonable prospect at this time that any such international tribunal will be created. The International Court of Justice has no jurisdiction to try individuals for criminal violations of the Genocide Convention.

Extradition in any case is subject to the due process guarantees written into American extradition treaties as a condition for extradition. Moreover, with the exception of only a handful of existing extradition treaties applying to future offenses, any legal authority to extradite for genocide would need to be provided after subsequent Senate or Congressional consideration of the individual extradition treaty in question.

6. What amendments, reservations, declarations or understandings should be attached to the Genocide Convention?

The Senate should give advice and consent to the Genocide Convention with the three understandings and one declaration

approved by the Senate Foreign Relations Committee and by President Reagan. Since these are non-controversial I will not comment on them except to generally describe them and endorse them as wise clarifications and procedures.

The first understanding which the Senate should include in its resolution of ratification clarifies the "intent to destroy", in whole or in part, language of Article II to mean the intent to destroy "in such manner as to affect a substantial part of the group concerned". This understanding merely states the common sense proposition that genocide is intentional mass murder of a national, ethnical, racial or religious group, as such, and not isolated common crimes.

Similarly, the proposed understanding of the United States government that the "mental harm" language of Article II (b) means the "permanent impairment of mental faculties" simply clarifies the definition of genocide consistent with precise and narrow criminal standards and the well established constitutional law protecting free speech.

The third proposed understanding assures that nothing in Article VI "shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state". As noted above, this is an important understanding to assure the full and continued independence of the American legal system and the continued extension of full constitutional rights to any and all United States citizens who may be subjected to allegations concerning genocide.

Finally, the proposed declaration, stating that the United States "will not deposit its instrument of ratification until after the implementing legislation referred to in Article V has been enacted", is a common sense statement by the United States government that, following an affirmative Senate vote on advice and consent, it will not accede to the Genocide Convention until Congress has first passed domestic implementing legislation pursuant to Article V of the Convention. This both protects

Congressional involvement in Convention implementation and assures that our international legal obligations will be fully met at the time the Convention becomes binding on the United States. It makes absolutely clear, as is indeed evident from the face of the Convention, that the Genocide Convention is not self-executing in American courts.

It is likely that there will be controversy, as there has been in the past, concerning whether the United States should reserve to Article IX accepting the jurisdiction of the International Court of Justice "relating to the interpretation, application or fulfillment" of the Convention. This issue is not an easy one and if there is strong Senate feeling to have a reservation to Article IX, I would regard it as more important to give advice and consent to the Convention than to prevail in any view on the Article IX issue, pro-reservation or anti-reservation.

After agonizing about the World Court issue under Article IX I believe that, on balance, it is preferable for the United States not to have a reservation to Article IX. I do not regard the opposite conclusion as unreasonable in light of recent actions of the Court in and surrounding the Nicaragua case. Reasons supporting advice and consent to Article IX with no reservation include the following:

- o under the Genocide Convention, as under multilateral conventions in general and unlike acceptance of the compulsory jurisdiction of the Court under the optional clause, the Court is constrained by a defined normative standard agreed by the United States;
- o the United States is already a party to over 80 multilateral treaties referring disputes to the Court and it has been a foreign policy practice of the United States to encourage such treaty clauses. Many

important treaties now pending before the Senate contain such clauses;

- o some nations may interpret a United States reservation to Article IX as inconsistent with a major purpose of the treaty and thus argue such a reservation would legally negate United States accession. The Netherlands, a close NATO ally of the United States, has made such a statement with respect to the Soviet-bloc reservation to Article IX;
- o unlike the situation with respect to acceptance of the general compulsory jurisdiction of the Court, most of our allies have accepted without reservation the Court's jurisdiction under Article IX and many place considerable importance on such acceptance, as is indicated by the Netherlands' objection to the Soviet Article IX reservation;
- o if we have a reservation to Article IX we cannot bring an action in the Court against others for violation of the Convention; for example, an action against Nicaragua for genocide against the Miskito Indians; and
- o most importantly, the United States is already subject to actions concerning genocide before the World Court under our prior general acceptance of the compulsory jurisdiction of the Court and the international law principle that genocide is already a crime under customary international law. One reason to ratify the Genocide Convention is to obtain clarity in legal obligation under the Convention as opposed to vague customary international law. To reserve to Article IX will remove this benefit of accession and put us back under the vague setting of the customary international law standard without benefit of United States understandings that would accompany our accession.

CONCLUSION

In conclusion, Mr. Chairman and members of the Committee, there are strong moral, foreign policy and national security reasons why the United States should accede to the Genocide Convention. And there are no constitutional or other legal impediments to that accession.

As an American I take great pride in my country and its record in human rights. It is right that our nation accede to the Genocide Convention -- and it is long overdue. We have a long struggle ahead for human rights and control of totalitarian abuses in a dangerous world. United States accession to the Genocide Convention will not alone reform the behavior of ruthless and grotesque regimes bent on genocide. But we must not fail to take the small -- but greatly important -- step, to accede to the Genocide Convention, in doing all we can to eliminate genocide from the future of mankind.

John Norton Moore is Walter L. Brown Professor of Law and Director of the Center for Law and National Security at the University of Virginia. Formerly he served as Counselor on International Law to the Department of State and as a United States Ambassador to the Law of the Sea Conference. He is Chairman of the American Bar Association Standing Committee on Law and National Security and has testified on two prior occasions on behalf of the American Bar Association in support of United States ratification of the Genocide Convention. He is also President of the Conflict Analysis Center in Washington, D.C. which has prepared and distributed an educational pamphlet on United States ratification of the Genocide Convention. The views expressed are his own.

This testimony draws heavily on the pamphlet prepared by the educational Conflict Analysis Center entitled "Genocide:

Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide (1984). Copies of this pamphlet may be obtained from the Conflict Analysis Center in Washington, D. C. and a copy has been submitted for inclusion in the hearing record of this hearing.

See generally on the continuing struggle for human rights M. McDougal, H. Lasswell & L. Chen, Human Rights and World Public Order (1980); L. Sohn & T. Buergenthal, International Protection of Human Rights (1973); R. Lillich & F. Newman, International Human Rights: Problems of Law and Policy (1979).

RESPONSES BY JOHN NORTON MOORE TO WRITTEN QUESTIONS FROM SENATOR ORRIN G. HATCH

Question No. 1. Can a treaty affect or nullify the provisions of the state constitutions?

Answer. Yes.

Question No. 2. Can a treaty affect or nullify a state statute?

Answer. Yes.

Question No. 3. Can a treaty affect or nullify a prior judicial decision of a state supreme court?

Answer. Yes.

Question No. 4. Can a treaty affect or nullify existing federal legislation on the same subject?

Answer. Yes.

Question No. 5. Can a treaty increase the powers of the Federal Government at the expense of the states?

Answer. Yes.

Question No. 6. Is a treaty or international agreement which conflicts with the constitution null and void?

Answer. Such a treaty or other international agreement would be voidable by the United States. The determination of whether a treaty or other international agreement in fact does conflict with the Constitution is, of course, a legal determination made only by the Supreme Court of the United States, and not by any international organization or body or any other country.

Question No. 7. Is the power to make international agreements limited to a particular subject?

Answer. Under the Constitution the power to enter into treaties is vested in the President by and with the advice and consent of the Senate. The enumeration in the Constitution of subjects of treaties has been interpreted by the Supreme Court as a broad power. The power to make "international agreements" is, on the one hand, limited by the treaty-making power of the Constitution requiring the consent of the Senate and, on the other hand is a very broad power vested in the President under Article II of the Constitution.

Question No. 8. The Genocide Convention makes any official or individual punishable for "direct and public incitement to commit genocide." Does this mean that if a member of Congress justifies the action of Jews killing Arabs in the Middle East that he can be prosecuted for genocide? What about the constitutional guarantee of freedom of speech? What about the freedom of the press?

Answer. A member of Congress or, for that matter, any other public official or private individual, could not be prosecuted for genocide for justifying the action of Jews killing Arabs in the Middle East. The language of the Genocide Convention establishing the crime of genocide for "the direct and public incitement to commit genocide" was specifically included in the Convention at the insistence of the United States in such a way as to be fully protected by the safeguards of the First Amendment to the Constitution.

Question No. 9. Could the Genocide Convention lead to the creation of an international penal court for trials of American citizens for genocide without the constitutional safeguards and legal rights accorded persons charged with domestic crimes?

Answer. The Genocide Convention would not and could not lead to the creation of an international penal court for trials of American citizens for genocide without the constitutional safeguards and legal rights accorded persons charged with domestic crimes. The establishment of any international penal tribunal to whose jurisdiction the United States would subject itself and its nationals could not be accomplished in a manner which would undermine the constitutional safeguards provided in the United States.

Question No. 10. Would an American charged with the commission of genocide in the United States, be sent out of the country for trial before an international penal tribunal, if such a court were established, and its jurisdiction accepted by the United States under the Genocide Convention, in light of the Sixth Amendment to the United States Constitution which gives to every person accused "the right of a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed?"

Answer. An American charged by state or federal law enforcement officials with the commission of the crime of genocide in the United States would be tried in the United States pursuant to the provisions of the Sixth Amendment of the U.S. Constitution.

Question No. 11. Article IX of the Genocide Convention provides that disputes between parties to the Convention relating to "the interpretation, application, or fulfillment" of the Convention "shall be submitted to the International Court of Justice at the request of any of the parties."

Answer. Article IX of the Genocide Convention does not and cannot make the International Court of Justice instead of the United States Supreme Court the "court of final appeal." In any event, the International Court of Justice has no penal jurisdiction and no individual alleged to have committed the crime of genocide could be tried by that court. The United States Supreme Court is, of course, the final interpreter of all constitutional questions and the ultimate appeal tribunal in the United States. The Genocide Convention does not and cannot alter that fundamental fact.

Question No. 12. Does Article IX override Article III, Section 1, of the United States Constitution which states, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish;" and Article III, Section 2, which states: "The judicial powers shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made under their authority . . .?"

Answer. Article IX of the Genocide Convention does not override Article III of the United States Constitution.

Question No. 13. What will the United States gain by signing the Convention?

Answer. Please refer to the testimony of Prof. John Norton Moore which details the numerous benefits to the United States by ratifying the Genocide Convention and the various detriments to the United States if the Convention continues to be ratified by the U.S.

Question No. 14. What will the United States lose by not signing the Convention?

Answer. Please refer to the testimony of Prof. John Norton Moore which details the numerous benefits to the United States by ratifying the Genocide Convention and the various detriments to the United States if the Convention continues to be unratified by the U.S.

Question No. 15. Why is it undesirable to federalize criminal law?

Answer. Congress has, of course, enacted untold numbers of federal criminal laws, ranging from those protecting the President of the United States and other government officials, to those enacted last year implementing international treaties concerning aircraft hijacking and hostage-taking by terrorists. In fact, one of the primary areas of major congressional concern in recent decades has been the need to strengthen federal criminal laws. Thus, it would appear clear that Congress considers it highly desirable—and that the American public strongly concurs—to strengthen federal criminal law and law enforcement.

Question No. 16. What exactly is the legal status of the State Department's three understandings and one declaration?

Answer. The response to this question is most appropriately provided by the Department of State. However, a clear statement of the Department's view of the

three understandings and one declaration supported by the American Bar Association and endorsed by the Senate Committee on Foreign Relations on five occasions is outlined in the attached excerpt from the Committee on Foreign Relations' Report.

EXCERPT FROM THE COMMITTEE ON FOREIGN
RELATIONS' REPORT No. 94-23

6. UNDERSTANDINGS AND RESERVATIONS

The understandings and declaration which the committee agreed to recommend to the Senate have been discussed in the text of the report as well as reproduced at the beginning and in the resolution of ratification which is included in this report.

There was considerable discussion as to the nature and effect of these understandings. For this reason, there follows a memorandum on this question, prepared at the committee's request by the Department of State.

DEPARTMENT OF STATE.

Washington, D.C., March 26, 1971.

Hon. J. W. FULBRIGHT,
*Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: In the hearings on March 10, 1971, on the Genocide Convention before a subcommittee of the Senate Foreign Relations Committee, questions were raised concerning the difference between a "reservation" and an "understanding" and as to the legal effect of the latter. In response to Senator Javits' request, I enclose a memorandum on the subject, prepared in the Office of the Legal Advisor.

There was also some discussion in the hearings as to whether the understandings to the Genocide Convention recommended by the Foreign Relations Committee in Executive Report No. 91-25 were properly designated as such or whether they should more appropriately be termed reservations. I would like to take this occasion to express the view of the Department of State that the proposed understandings and declarations set forth in the report are properly designated. We feel that it is neither necessary nor desirable to redesignate any of them as reservations.

The first of these understandings merely serves to emphasize that the element of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" is basic in proving a charge of genocide, and consequently proof would be required that the genocidal acts charged had been committed "in such a manner as to affect a substantial part of the group concerned."

The second proposed understanding construes the words "mental harm" in article II to mean "permanent impairment of mental faculties." This construction is in keeping with the generally understood meaning of the term in the context of article II. It would make clear that the term could not be construed as applying to various lesser forms of mental harassment toward minority groups. This construction is consistent with the negotiating history of the convention.

The third proposed understanding is explicitly based on the negotiating record of the convention, which clearly adopts the interpretation that nothing in Article VI shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state. The possibility of concurrent jurisdiction thus created is supported not only by the negotiating record but by the practice of other states.

The Department regards all three of these understandings as consistent with the terms of the convention and as not excluding or modifying their legal effect.

We trust that this information will be useful in answering the questions raised in the subcommittee hearings, but if we can be of any further assistance, please let us know.

We are looking forward to prompt and favorable action on the Genocide Convention by the committee and the Senate as a whole.

Sincerely yours,

DAVID M. ABSHIRE,
Assistant Secretary for Congressional Relations.

Enclosure: Memorandum.

[From the Office of the Legal Adviser, Department of State, March 22, 1971]

MEMORANDUM CONCERNING RESERVATIONS AND UNDERSTANDINGS TO TREATIES

A statement made in or accompanying the ratification of a treaty constitutes a reservation when it would exclude or vary the legal effect of one or more of the provisions of the treaty in their application to the reserving State.

A statement made in or accompanying the ratification of a treaty which merely explains or clarifies the meaning of the provisions of the treaty but does not exclude or vary their legal effect would constitute an understanding.

A statement intended by a ratifying State to exclude or to modify the legal effect of one or more provisions of a treaty as applied to that State should be designated by that State as a "reservation". Where a State wishes to set forth its interpretation of the provisions of a treaty without intending

to change their legal effect as understood by it, the statement should be designated as an "understanding".

The designation by the ratifying State is not controlling. Whether the statement modifies the legal effect of the treaty or merely expresses its true intent depends on the substance of the statement and is not solely within the judgment of the State making the statement.

A statement made as a condition to a State's ratification, whether designated as a "reservation" or an "understanding", is communicated by the depositary to the other signatory and acceding States. Each of those States has the right to decide whether the statement modifies the legal effect of the treaty and whether it will consider itself in treaty relations with the reserving State. Failure of other States to object within a reasonable time may be regarded as acceptance by them of the reservation or understanding, which thereupon has legal effect internationally as a condition to the ratification of the State making it.

In United States law a condition placed by the Senate on its approval of a treaty—whether by reservation or by understanding—and included by the President in the instrument of ratification takes effect as domestic law along with the treaty itself. This is a necessary result of the shared constitutional role of the President and the Senate in the treaty-making process.

It is to be noted that the term "reservation" applies only when a statement accompanying ratification "would exclude or vary the legal effect of one or more of the provisions of the treaty in their application to the reserving state." None of the statements recommended by the committee, nor indeed otherwise suggested to date, falls under this definition since, in the view of the committee concurred in by the Department of State, they are consistent with the treaty, its negotiating history, and the practice of other contracting states. Indeed, it can be argued that they merely describe the tenor of the implementing legislation to be enacted which is a matter of our domestic concern.

The same logic also applies to the argument that the committee-sponsored understandings somehow weaken or lessen the effect of U.S. ratification of the treaty. It is the committee's view that undertaking to explain what the convention means to the United States in no way downgrades the treaty or the obligations assumed by the U.S. under its provisions. It is a legitimate exercise of the Senate's advice and consent function. The essential point remains that ratification of the convention is worthwhile, regardless of the effect of the understandings.

A related concern that the Supreme Court would disregard the proposed understandings reverts to the allegation that the understandings contravene the explicit language of the convention despite the committee's expressed view to the contrary. The Supreme Court can be expected to give full weight to the view of the committee and the negotiating history of the convention in any matter that might come before the Court in connection with the treaty.

Question No. 17. What is the significance of the ICJ ruling on reservations?

Answer. The significance of the International Court of Justice's statement on reservations is best understood by reviewing that opinion, a copy of which is attached.

FROM SWEENEY, THE INTERNATIONAL LEGAL SYSTEM (2D ED.)
THE FOUNDATION PRESS, MINEOLA, NY (1981)

**RESERVATIONS TO THE CONVENTION ON GENOCIDE
(ADVISORY OPINION)**

International Court of Justice, 1951.
[1951] I.C.J. Rep. 15.

[On November 16th, 1950, the General Assembly of the United Nations requested the Court to respond to the following questions concerning the Genocide Convention:]

- I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if

the reservation is objected to by one or more of the parties to the Convention but not by others?

II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

- (a) The parties which object to the reservation?
- (b) Those which accept it?

III. What would be the legal effect as regards the answer to Question I if an objection to a reservation is made:

- (a) By a signatory which has not yet ratified?
- (b) By a State entitled to sign or accede but which has not yet done so?

* * *

The Court observes that the three questions which have been referred to it for an Opinion have certain common characteristics.

All three questions are expressly limited by the terms of the Resolution of the General Assembly to the Convention on the Prevention and Punishment of the Crime of Genocide, and the same Resolution invites the International Law Commission to study the general question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law. The questions thus having a clearly defined object, the replies which the Court is called upon to give to them are necessarily and strictly limited to that Convention. The Court will seek these replies in the rules of law relating to the effect to be given to the intention of the parties to multilateral conventions.

The three questions are purely abstract in character. They refer neither to the reservations which have, in fact, been made to the Convention by certain States, nor to the objections which have been made to such reservations by other States. They do not even refer to the reservations which may in future be made in respect of any particular article; nor do they refer to the objections to which these reservations might give rise.

Question I is framed in the following terms:

Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

The Court observes that this question refers, not to the possibility of making reservations to the Genocide Convention, but solely to the question whether a contracting State which has made a reservation can, while still maintaining it, be regarded as being a party to the Convention, when there is a divergence of views between the contracting parties concerning this reservation, some accepting the reservation, others refusing to accept it.

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.

This concept, which is directly inspired by the notion of contract, is of undisputed value as a principle. However, as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention. Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations—all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.

It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number of reservations which have been made of recent years to multilateral conventions.

In this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that the faculty for States to make reservations was contemplated at successive stages of the drafting of the Convention. In this connection, the following passage may be quoted from the comments on the draft Convention prepared by the Secretary-General: " * * * (1) It would seem that reservations of a general scope have no place in a convention of this kind which does not deal with the private interests of a State, but with the preservation of an element of international order * * *; (2) perhaps in the course of discussion in the General Assembly it will be possible to allow certain limited reservations."

Even more decisive in this connection is the debate on reservations in the Sixth Committee at the meetings (December 1st and 2nd, 1948) which immediately preceded the adoption of the Genocide Convention by the General Assembly. Certain delegates clearly announced that their governments could only sign or ratify the Convention subject to certain reservations.

Furthermore, the faculty to make reservations to the Convention appears to be implicitly admitted by the very terms of Question I.

The Court recognizes that an understanding was reached within the General Assembly on the faculty to make reservations to the Genocide Convention and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto. It must now determine what kind of reservations may be made and what kind of objections may be taken to them.

The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96(I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact

approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

The foregoing considerations, when applied to the question of reservations, and more particularly to the effects of objections to reservations, lead to the following conclusions.

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.

Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.

It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot

share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.

On the other hand, it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto.

It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law. The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made to reservations. In fact, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule. It cannot be recognized that the report which was adopted on the subject by the Council of the League of Nations on June 17th, 1927, has had this effect. At best, the recommendation made on that date by the council constitutes the point of departure of an administrative practice which, after being observed by the Secretariat of the League of Nations, imposed itself, so to speak, in the ordinary course of things on the Secretary-General of the United Nations in his capacity of depositary of conventions concluded under the auspices of the League. But it cannot be concluded that the legal problem of the effect of objections to reservations has in this way been solved. The opinion of the Secretary-General of the United Nations himself is embodied in the following passage of his report of September 21st, 1950: "While it is universally recognized that the consent of the other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation."

It may, however, be asked whether the General Assembly of the United Nations, in approving the Genocide Convention, had in mind the practice according to which the Secretary-General, in exercising his functions as a depositary, did not regard a reservation as definitively accepted until it had been established that none of the other contracting States objected to it. If this were the case, it might be argued that the implied intention of the contracting parties was to make the effectiveness of any reservation to the Genocide Convention conditional on the assent of all the parties.

The Court does not consider that this view corresponds to reality. It must be pointed out, first of all, that the existence of an ad-

ministrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom. It must also be pointed out that there existed among the American States members both of the United Nations and of the Organization of American States, a different practice which goes so far as to permit a reserving State to become a party irrespective of the nature of the reservations or of the objections raised by other contracting States. The preparatory work of the Convention contains nothing to justify the statement that the contracting States implicitly had any definite practice in mind. Nor is there any such indication in the subsequent attitude of the contracting States: neither the reservations made by certain States nor the position adopted by other States towards those reservations permit the conclusion that assent to one or the other of these practices had been given. Finally, it is not without interest to note, in view of the preference generally said to attach to an established practice, that the debate on reservations to multilateral treaties which took place in the Sixth Committee at the fifth session of the General Assembly reveals a profound divergence of views, some delegations being attached to the idea of the absolute integrity of the Convention, others favouring a more flexible practice which would bring about the participation of as many States as possible.

It results from the foregoing considerations that Question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case.

Having replied to Question I, the Court will now examine Question II, which is framed as follows:

If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

- (a) the parties which object to the reservation?
- (b) those which accept it?

The considerations which form the basis of the Court's reply to Question I are to a large extent equally applicable here. As has been pointed out above, each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint. As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State; on the other hand, as will be pointed out later, such a decision might aim at the complete exclusion from

the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane.

The disadvantages which result from this possible divergence of views—which an article concerning the making of reservations could have obviated—are real; they are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.

It may be that the divergence of views between parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention.

Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.

Such being the situation, the task of the Secretary-General would be simplified and would be confined to receiving reservations and objections and notifying them.

Question III is framed in the following terms:

What would be the legal effect as regards the answer to Question I if an objection to a reservation is made:

- (a) By a signatory which has not yet ratified?
- (b) By a State entitled to sign or accede but which has not yet done so?

The Court notes that the terms of this question link it to Question I. This link is regarded by certain States as presupposing a negative reply to Question I.

The Court considers, however, that Question III could arise in any case. Even should the reply to Question I not tend to exclude, from being a party to the Convention, a State which has made a reservation to which another State has objected, the fact remains that the Convention does not enter into force as between the reserving State and the objecting State. Even if the objection has this reduced legal effect, the question would still arise whether the States mentioned under (a) and (b) of Question III are entitled to bring about such a result by their objection.

An extreme view of the right of such States would appear to be that these two categories of States have a *right to become* parties to the Convention, and that by virtue of this right they may object to reservations in the same way as any State which is a party to the Convention with full legal effect, i. e. the exclusion from the Convention of the reserving State. By denying them this right, it is said, they would be obliged either to renounce entirely their right of participating in the Convention, or to become a party to what is, in fact, a different convention. The dilemma does not correspond to reality, as the States concerned have always a right to be parties to the Convention in their relations with other contracting States.

From the date when the Genocide Convention was opened for signature, any Member of the United Nations and any non-member State to which an invitation to sign had been addressed by the General Assembly, had the *right to be a party* to the Convention. Two courses of action were possible to this end: either signature, from December 9th, 1948, until December 31st, 1949, followed by ratification, or accession as from January 1st, 1950 (Article XI of the Convention). The Court would point out that the right to become a party to the Convention does not express any very clear notion. It is inconceivable that a State, even if it has participated in the preparation of the Convention, could, before taking one or the other of the two courses of action provided for becoming a party to the Convention, exclude another State. Possessing no rights which derive from the Convention, that State cannot claim such a right from its status as a Member of the United Nations or from the invitation to sign which has been addressed to it by the General Assembly.

The case of a signatory State is different. Without going into the question of the legal effect of signing an international convention, which necessarily varies in individual cases, the Court considers that signature constitutes a first step to participation in the Convention.

It is evident that without ratification, signature does not make the signatory State a party to the Convention; nevertheless, it establishes a provisional status in favour of that State. This status may decrease in value and importance after the Convention enters into force. But, both before and after the entry into force, this status would justify more favourable treatment being meted out to signatory States in respect of objections than to States which have neither signed nor acceded.

As distinct from the latter States, signatory States have taken certain of the steps necessary for the exercise of the right of being a party. Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification.

Until this ratification is made, the objection of a signatory State can therefore not have an immediate legal effect in regard to the re-

serving State. It would merely express and proclaim the eventual attitude of the signatory State when it becomes a party to the Convention.

The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation. In the circumstances, it is of little importance whether the ratification occurs within a more or less long time-limit. The resulting situation will always be that of a ratification accompanied by an objection to the reservation. In the event of no ratification occurring, the notice would merely have been in vain.

For these reasons,

The COURT is of opinion,

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification,

On Question I:

by seven votes to five,

that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

On Question II:

by seven votes to five,

(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

(b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention;

On Question III:

by seven votes to five,

(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that

moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.

* * *

[Dissenting opinions omitted.]

1. *Vienna Convention provisions on reservations.* See Articles 19-23. These articles are the end product of the General Assembly's invitation to the International Law Commission, referred to in the Genocide case, to deal with the matter of reservations. How do the convention's provisions compare with the decision of the International Court of Justice? Do other states have to consent to reservations and if so how is consent to be determined? Are the needs of the United Nations Secretariat as a treaty depositary well met in the convention?

2. *Problems.*

a. State X, with nuclear capability, has not yet acceded to the Nuclear Test Ban Treaty, Documentary Supplement. What would be the legal consequences (a) under the Genocide case and (b) under the Vienna Convention if State X were to deposit the following instrument with the three depositary governments? "State X accedes to the Treaty Banning Nuclear Weapons in the Atmosphere, in Outer Space and under Water done at Moscow, August 5, 1963, subject to the reservation that the treaty shall not be deemed to inhibit the use of nuclear weapons in armed conflict."

b. State Y, a new state that has just come into existence, proposes to accede to a number of multipartite international agreements open for accession including the Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75-76 U.N.T.S. 135. It offers for deposit this reservation: "Provided, however, that persons guilty of war crimes shall not be entitled in State Y to treatment as prisoners of war under this Convention." At the time this proposal is made, military personnel of State A, which is engaged in armed conflict with State Y, have been captured in large numbers by State Y. State A is a party to the Geneva Convention. Assume the Vienna Convention is in force. What position would you as the relevant official of State A take as to this reservation under the Vienna Convention?

c. The United States and Canada negotiated a Treaty Concerning the Uses of the Waters of the Niagara River, 1 U.S.T. 694 (1950). The major purpose of the treaty was to allocate as between the two countries the amount of hydro-static potential each could use for the generation of electrical power. The Senate resolution of advice and consent included a reservation that the United States for its

Question No. 18. What is the significance of the ICJ's view of the universal application of the Convention?

Answer. See the response to question 17.

Question No. 19. Could an international genocide tribunal be created by executive agreement?

Answer. A so-called "international genocide tribunal" has never been proposed. Thus, the jurisdiction and structure of such an entity are unknown. Whether it could or would ever be created by Executive agreement of course depends upon the jurisdiction and the structure of such an entity.

Question No. 20. What difficulties might occur with foreign diplomats and dignitaries (i.e., Israeli and British) in the United States under the Convention?

Answer. It is difficult to imagine that any "difficulties" might occur with foreign diplomats and dignitaries under the Genocide Convention in the United States.

RESPONSES BY JOHN NORTON MOORE TO WRITTEN QUESTIONS FROM SENATOR CHARLES E. GRASSLEY

Question No. 1. Could an individual be prosecuted for the crime of genocide under the treaty, before an international tribunal, when his crime consisted of a single act against a single individual?

Answer. No.

Question No. 2. Does the absence of "political" group persecutions in the genocide definition, mean that designation of an individual or ethnic group as an "enemy of the state," and subsequent persecutions of that group, would escape international prosecution for the crime of genocide under the treaty?

Answer. No.

Question No. 3. If this is true, could Hitler have designated Jews as enemies of the state, and then systematically pursued their "extermination," unfettered by any provision of the Genocide Convention, if it was then in effect?

Answer. No.

Question No. 4. Would the Raj of India be permitted to execute all Sikhs as "enemies of the state" following the assassination of Indira Ghandi, rather than as an ethnic or religious group?

Answer. No.

Question No. 5. Was it the east-block, or communists nations, that objected to the inclusion of "political" persecution in the Convention, as has been alleged?

Answer. A number of the Western European as well as communist nations objected, among various provisions, to the inclusion of "national" persecution and to the inclusion of "political" persecution. Apparently the Soviet Union felt very strongly that the inclusion of "national" groups as a protected group under the Genocide Convention would determine Soviet expansionism. The United States ultimately did not object to the deletion of "political" because, among other things, it became increasingly evident that the definition of that term would be difficult. The United States would have preferred its retention. However, the United States insisted upon the inclusion of "national" groups in the Genocide Convention which was accomplished and which remains an integral part of the treaty now pending before the Senate.

Question No. 6. Why are convention's terms aimed at individuals, rather than governments, when it is difficult to imagine genocide being conducted against a whole segment of a population without the cooperation of the state? On the theory that a "corporation" or "entity" cannot be guilty of a crime?

Answer. The Genocide Convention is aimed both at individuals and at governments; the suggestion that the treaty does not impose on governments any responsibility simply is incorrect. Article I of the Convention states, "the Contracting Parties confirm that Genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish (emphasis added)." Article II of the Convention defines Genocide in terms of the commission of five enumerated acts and Article III enumerates those acts which shall be punishable. Neither article limits its application to individuals, per se, nor does either act exclude governments. Article V pledges governments to enact, "in accordance with their respective constitutions" laws to implement the Convention and to provide penalties for those found guilty of violations of the Convention. Article VIII authorizes any government a party to the Convention to call upon the competent organs of the United Nations to act to prevent or suppress acts of genocide or other acts enumerated in Article II. Finally, and most important, Article IX authorizes the International Court of Justice, at the request of a party to a dispute, to con-

sider cases relating to the interpretation, application or fulfillment of the provisions of the treaty, "including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in Article III (emphasis added)."

Article IV directs that "persons" shall be punished "whether they are constitutionally responsible rulers, public officials or private individuals" and Article VI provides for the trial of "persons" charged with genocide.

Thus, the treaty takes a balanced approach to the respective responsibilities of states and individuals. States, of course, cannot actually pull the trigger or conspire to pull the trigger, etc., only individual people can. Thus, under the treaty, individuals are actually liable for the commission of the crime of genocide and may be so tried before state penal tribunals. States are responsible to see that laws are enacted prohibiting genocide, providing for the imposition of penalties upon convictions of genocide any may be held liable under Article IX for failure to accomplish such goals.

Question No. 7. Was it the Soviets that objected to the language "with the complicity of government" to the Genocide definition?

Answer. Reportedly the Soviet Union and other governments objected to this language. However, as noted in response to question No. 6, government responsibility is clearly spelled out.

Question No. 8. Would ratification of the treaty supersede all previous treaties and acts of Congress that are inconsistent with its terms, including bilateral extradition treaties with other nations?

Answer. Yes, insofar as prior acts of Congress or treaties in force are in fact and specifically contrary to the provisions of the Genocide Convention. Thus, for instance, a federal law stating that genocide was not a crime in the United States would indeed be superceded by the Genocide Convention. Since the Genocide Convention itself is not an extradition treaty and no current bilateral extradition treaties explicitly include the crime of genocide it would be difficult to imagine a situation in which an extradition treaty would be superceded by the Genocide Convention.

Question No. 9. Would any person charged with genocide be tried before an international tribunal, even if they are tried by their own nation for the same or an underlying act?

Answer. No.

Question No. 10. If this is true, would that not offend the Constitution's provisions against "double jeopardy"?

Answer. No.

Question No. 11. Would a person who commits murder of a person or a group of persons because of a racial or religious hatred, in one of our states, be tried for genocide in a federal court rather than murder or mass murder in the state in which the violence occurred?

Answer. No.

Question No. 12. Would a person tried in United States courts for the act of genocide, be accorded the constitutional and legal protections that an accused defendant enjoys for other crimes under U.S. law?

Answer. Yes.

Question No. 13. Would a person accused of the crime of genocide before an international tribunal be accorded the protection an accused person has in the United States, even if he is a U.S. citizen and the crime or crimes occurred within U.S. jurisdiction?

Answer. There is no international tribunal with criminal jurisdiction before which anyone could be tried for the crime of genocide (or, for that matter, any other crime). Should such a court ever be considered by the United States Senate it is doubtful that United States Senators would agree to the jurisdiction of an international criminal court without the protection for U.S. citizens accorded by the U.S. Constitution.

Question No. 14. Would a Congressionally passed statute expanding the rights of the accused, or an evidentiary rule of a judge that expands those rights, in a prosecution of an individual in U.S. courts for the act of genocide, subject to the legislators or judges to prosecution as well?

Answer. No.

Question No. 15. Would American military personnel, serving in time of war, be subject to punishment for the crime of genocide for acts that involve the taking of life of enemy troops, or the forced relocation of civilian populations in a "war zone"?

Answer. As a general principle the killing of enemy troops during wartime would not subject the killer prosecution under the Genocide Convention. However, as was undoubtedly the case, for instance, in Nazi Germany, such taking of life with the

requisite intent under Article II of the Genocide Convention as confirmed by Article I of the treaty could indeed subject such troops to prosecutions for genocide—if the intent was not merely to kill that individual, but rather that the individual was killed with the intent to destroy, “in whole or in part, a national ethnical, racial or religious group as such.” The “forced relocation of civilian populations” would not subject those doing the relocating to prosecution for genocide unless, again, the act were undertaken with the requisite intent and met one of the definitions of genocide in Article II.

Question No. 16. Would the treaty be self-executing, or would legislation be needed to enforce the Genocide Convention as it applies to the United States?

Answer. The Genocide Convention is not self-executing.

Question No. 17. Would ratification subject any citizen of the United States accused of this crime to international jurisdiction, without the possibility of the United States to object to the jurisdiction of the tribunal?

Answer No.

Question No. 18. Would the state of Israel, or any of its officials and citizens be subject to international prosecution under the Genocide Convention, upon the complaint of Yassir Arafat or the P.L.O., that its West Bank settlement policies constitute genocide against the Palestinian people?

Answer: No.

Question No. 19. If so, would Prime Minister Peres, or other Israeli official be subject to arrest while visiting the United States, and subsequent extradition, upon the complaint of the P.L.O.?

Answer. No.

Question No. 20. Could the actions of this government to reduce budgetary deficits by reducing entitlement or other social welfare programs that tend to disproportionately benefit ethnic or religious groups, constitute genocide?

Answer. No.

Question No. 21. Given that the Nuremberg Declarations found that the promotion of abortions among minority populations amounted to genocide, could not the location of abortion facilities in neighborhoods that are primarily made up of one race, constitute Genocide?

Answer. No.

Question No. 22. Do you believe that had this treaty been in effect, and Germany a party to it in the 1930's that Hitler would have been prevented from pursuing the elimination of the Jewish people, and the others that were persecuted?

Answer. All of these questions beg the question. By definition, a individual or national leader driven to criminality is a person who ignores the law. The strength of the American democracy, however, and the position of the United States in the world community, is that our statements and condemnations of acts of foreign despots often so focus world opinion against such actions that their effect indeed may be moderated. This, after all, is one of the current strategies of our government in response to South African apartheid policies. Whether Hitler would have been “prevented” from pursuing the elimination of the Jewish people if the treaty had been in effect is doubtful, since he did not stop the Holocaust until the Allies had crushed him militarily. But it should not be forgotten that it was Hitler who said, “who remembers the Armenians?” when speaking about his policies against the Jews. Thus, clearly, he was aware that world opinion is an important consideration, especially when a ruler seeks to pursue such fundamentally reprehensible policies.

Similarly, it is doubtful that Stalin's atrocities or the mass executions during the Chinese cultural Revolution would have been “prevented” by U.S. ratification. Likewise, the genocide undertaken in Kampuchea or the persecution of the Mesquito Indians in Nicaragua “stopped” by the treaty. But a hundred lives would have been saved—or even one life—because of U.S. ratification, the effort would have of course been well served.

It would be simplistic to suggest that the ratification of the Genocide Convention would stop genocide just as it is simplistic to suggest that the existence of statues in every state of the Union against murder has “stopped” people from committing murder. But there are certain fundamental norms of human decency and civilized behavior which are part of our law and the law of nations simply because they are so fundamental. Genocide is one and should promptly be made part of the law of the United States. Only then will the U.S. be able to pursue those international outlays noted in these questions.

Question No. 23. Do you believe that Stalin would have been prevented from fostering the mass starvation and executions of the Ukraine?

Answer. See answer to question No. 22.

Question No. 24. Do you believe that the mass executions of the Cultural Revolution in the People's Republic of China could have been prevented by this treaty?

Answer. See answer to question No. 22.

Question No. 25. Why were not the mass executions of Kampuchea stopped by the Genocide Convention?

Answer. See answer to question No. 22.

Question No. 26. Why is the persecution of the Mesquito Indians in Nicaragua not the subject of a genocide prosecution right now?

Answer. See answer to question No. 22.

Question No. 27. Does the advocacy of religious or racial hatred, constitute an act of Genocide under the Treaty's "incitement" provision, and thereby violate the First Amendment's protection of "free speech" regardless of how offensive the speaker is?

Answer. No.

Question No. 28. Does the treaty permit the United Nations or other international tribunal, to cite the United States or any individual or government official, for genocide, by failing to act to pass legislation implementing the treaty?

Answer. The treaty does not permit the United Nations or any other nation to cite the United States for committing genocide by failing to pass implementing legislation. However, another signatory to the treaty—not the United Nations or any other international tribunal—might attempt to bring a case before the International Court of Justice under Article IX for the failure of the United States to pass implementing legislation pursuant to Article V. However, since the treaty is not self-executing and since the proposed resolution of ratification of the treaty declares that the United States will not submit its articles of ratification until it has adopted implementing legislation, such a case could not, in fact, be brought. Thus, another nation would have no ability to sue the United States for failing to pass implementing legislation under Article V if such action were instituted before the United States ratified the treaty and subjected itself to the provisions of Article IX. Once it did ratify the treaty and thus become a contracting party it would, by definition, have complied with the provisions of Article v.

Question No. 29. What would constitute "causing mental harm" under the provisions of the treaty?

Answer. As clarified by the Administration and the report of the Senate Foreign Relations Committee repeatedly, "causing mental harm" under Article II (b) of the treaty means the to cause "permanent impairment of mental faculties." This was stipulated in the understanding recommended by the Departments of State and Justice and the Foreign relations Committee since 1971. Such, permanent impairment would result from such measures as surgery and the application of mind altering drugs.

Question No. 30. Would the failure of the United States to act to restrain the persecution of a people in another country, subject the President or the Secretary of State to prosecution for an act of genocide before an international tribunal?

Answer. No.

Senator HATCH. Thank you, Mr. Moore.

We will now hear from Mr. Rodolphe J.A. de Seife. Professor de Seife is a member of the District of Columbia and Maryland bars, and a professor of law at Northern Illinois School of Law. He was in private practice for nearly 20 years with offices in Paris, France, and Washington, DC, after serving as litigation attorney with the Antitrust Division of the U.S. Department of Justice.

He was attached to the Moroccan Ministry of Justice as a Fulbright Professor of Law at the National Institute of Juridical Studies. Professor de Seife is fluent in French, German, and Italian. We are very happy to have you with us.

STATEMENT OF RODOLPHE J.A. de SEIFE, PROFESSOR OF LAW, NORTHERN ILLINOIS UNIVERSITY COLLEGE OF LAW

Mr. DE SEIFE. Thank you. I am honored to be here today. With your permission, I would like to have my prepared statement placed into the record.

Senator HATCH. Without objection, we will put all prepared statements in the record.

Mr. DE SEIFE. I will be brief.

I wish if I could share Professor Moore's optimism, and I am always ill at ease when I am surrounded by eminent authorities in international and constitutional law, but I will say this: Even respected scholars can be wrong. I hate to be put in the position to have to take issue with just about everything Professor Moore has said. I do feel strongly, however, along with him, that any reservation, for that matter even understandings resulting in reservations, will nullify the meaning of the treaty. I agree with the United Kingdom's position on that.

My notion is a simple one, Mr. Chairman. No. 1, if the genocide treaty could even remotely achieve what it is supposed to achieve, if the genocide treaty was in the form in which Dr. Maktos originally wanted it to be, then I would plead for its ratification. John Maktos was one of my professors and, incidentally, I can only claim a little bit of reflected fame if any at all—I happened to be a student of Jessup, Lissitzyn, Maktos, and Mallinson, all of whom are very dear people and eminent authorities. Dr. Maktos felt that the Convention would be meaningless unless governments were made an indispensable party to genocide, No. 1.

No. 2, the treaty would be self-defeating once it did not include, in its definition as to the victims of genocide, members of an economic or political group.

It is a fact, Mr. Chairman, that Dr. Maktos, chairman of the American delegation, pushed for the ratification, by the signatories, of this treaty. It is under the leadership of the United States, as was pointed out earlier, that the Convention was adopted by the then members of the United Nations in 1948.

However, it should be pointed out that the end product of the Convention had very little to do with what was the initial *sine qua non* position under Dr. Maktos' leadership.

For purposes of distinguishing between treaties and conventions, I like to use the word contractual treaties which are the normal treaties that the founding fathers knew about which are the result of one-on-one negotiations between sovereigns, these negotiations having as an object external matters to their sovereignty and their relations among each other.

The conventions are a relatively modern development. Conventions, I call them legislative treaties for want of a better word. Of course, the United Nations is not a legislature. Be that as it may, bear in mind, Mr. Chairman, that this particular Convention, for instance, is written in five languages, each text of which is the official text of the Convention. In other words, if you are in China, it is not the English text that is controlling: it is the Chinese text. If you are in France, it is the French text that controls, and if you are in Spain or in a Spanish-speaking country, it is the Spanish text. If you are in England or in our country, it is the English text. I think people seem to think this Convention was written in English. It was discussed in English, but what we have is an amalgam of political philosophies that do not match what we believe are fundamental concepts under our Constitution.

Our Constitution is unique, Mr. Chairman. Our allies in France who have signed and ratified the Convention do not have the constitutional problems we have. As a lawyer, I can say that Congress has passed before either meaningless or vague laws and, what the heck, one more: we make more money. From a practical viewpoint, I know that if this treaty is ratified, I will use it when I have a client and I know how to use it.

As a lawyer, however, who believes strongly that the U.S. Constitution does not provide for the ratification of public relations treaties, I take issue with its proponents. It is not in the interest of the United States to act like other governments. In fact, the Constitution mandates us that the treaty is co-equal with any other fundamental law and, in fact, a treaty supersedes state law, it also supersedes all congressional legislation to the date of ratification. Of course, later congressional legislation will supersede the treaty.

It is not the first time we talk about *Reid*. The Supreme Court in *Reid v. Covert*, when the proponents allay our fears about a treaty doing away with constitutional guarantees, I suggest to you that this opinion is not the Constitution. When the Supreme Court speaks, it speaks for the moment because the next Supreme Court may very well reverse itself or change itself. We have seen it. Who is to say that the next Supreme Court is not going to allay someone else's fears.

Senator HATCH. We will have to recess for just a few moments.
[Brief recess.]

Senator HATCH. I apologize. I had to chat with my senior colleague, Senator Garn. Since he is going up into space, I want to chat with him all I can. We have not been together as much as we really need to be, so I appreciate your indulgence in letting me have that time.

Continue, Professor.

Mr. DE SEIFE. Thank you, Mr. Chairman.

With respect to *Reid*, we have to remember that the Supreme Court decisions, while they may be explanatory of the Constitution, are not the Constitution itself. They change with the personnel of the Supreme Court.

The founding fathers, and I have some cites in my prepared statement, have had a very clear grasp of what the treaty-making power was all about, and they knew that the treaty power was to be reserved to the nation for those so called contract treaties, as I called them earlier. The founding fathers had absolutely no vision of conventions.

In conventions you have over 100 delegates from as many different nations working through commissions. You wind up with definitions which are compromises at best, and at best they mean what the person who reads them thinks they mean. I don't think this is

the way we ought to proceed. If you don't have a Genocide Convention which has a code which specifically and intelligibly defines the crimes which constitute genocide, if you do not have a court, an impartial present court, not the International Court of Justice, an impartial court which interprets the law impartially, and if you don't have a valid enforcement mechanism, I submit to you, Mr. Chairman, that the Genocide Convention is merely a public relations gimmick and our Constitution does not provide for that type of treaty. To elevate it to the rank of a treaty, I think, is not to help our cause for freedom and justice. It is to give a legitimate forum for more propaganda. To think, for one minute that because we ratified the Genocide Convention this is going to in any way change the tactics of Qaddafi or the Soviet Union or anyone else is not being terribly realistic, I suggest.

My advice, for what it is worth, is that we should not sign a treaty which by the admission of its own proponents, is merely a propaganda tool. We should sign only treaties that are treaties because treaties to us, in our peculiar system which is a unique system, are paramount to any other laws and equal to the Constitution. It is too serious a business to take lightly. If the Senate were to distinguish between treaties and conventions and say we will sign this because it does not mean anything to anybody anyway, that is fine, but that is not the way we should proceed.

We speak best by action. It is when the United States does not support dictators to the left or right who oppress their people. This is much more telling, Mr. Chairman, than us ratifying a Genocide Convention which most people don't know that much about because the people have been misinformed as to the real importance of the Genocide Convention. The text of the Genocide Convention is in fact what the Russian delegation would accept, and we were so eager to get them to sign that document that we bought their *sine qua non* condition, Mr. Chairman. It was a total unilateral abandonment by the United States of its original position as I quoted earlier statements to me by Dr. Maktos.

Therefore, I beseech the Senate, Mr. Chairman, not to sign a meaningless Convention. I think what this body ought to do on the other hand is by joint resolution let the President know that we do not wish to deal with countries that engage in genocide. We know what genocide means in the United States, but it does not necessarily mean what the Genocide Convention means. The way it is now, the Russians, the Kampuchians, or anyone else commit genocide with impunity. You can take Jewish citizens of a state and say they are political dissidents. That takes them out from under the

Convention. What are we going to engage in—more rhetoric? Rhetoric is not what it is all about. Our actions speak louder than words.

Thank you, Mr. Chairman.

[The prepared statement of Mr. de Seife and responses to written questions follow:]

PREPARED STATEMENT OF RODOLPHE J. A. DE SEIFE

INTRODUCTION

The Genocide Convention adopted by the General Assembly of the United Nations on December 9, 1948 and signed by the United States of America, one of its prime movers, on December 11, 1948, has come up repeatedly before the United States Senate for ratification. Nothing has happened to change my view, then held as a law student, that the Convention should not be ratified in its present form, since President Truman first submitted the convention in the Senate for its ratification. What was a student's researched and reasoned opinion has, over the past three and one half decades, been confirmed and reinforced by experience and academic research.

I wish to put to rest the notion that those who oppose ratification of the Genocide Convention somehow believe that genocide could ever be labeled as acceptable behavior by any government or individual in a civilized world. Along with the eminent scholars who have supported the ratification of the Convention, several of whom were my revered and respected teachers (Jessup, Lissitzyn, Maktos and Mallinson) and others whom I consider to be my friends and fellow laborers in the vineyards of peace, I abhor violence as a method to settle disputes and think of genocide as a crime which deserves the ultimate punishment of "outlawry" (hostis humani generis), thereby espousing without reservation the objectives of the Genocide Convention.

Nor do many who oppose ratification deserve to have their concerns dismissed by sweeping and unsupported characterizations such as the one made by Professor Myres S. McDougal at the forty-third annual meeting of the American Society of International Law: "[Opposition to the Convention] moves from a complete misconception of the conditions under which we live today, a complete misunderstanding of the nature and the role of international law, a complete misunderstanding of our constitutional requirements and the obligations imposed by the United Nations Charter, and a tragic failure to consider what rational action calls for under the conditions of the present time"¹

We only differ on how we perceive the effects of this "treaty" on our democratic system of justice, even if it is largely rhetorical and non self-executing, and if it is ratified primarily to serve public relations objectives, no matter how well intentioned. The fact that we may not all have been blessed with the deep insight and knowledge apparently common to the proponents of ratification does not preclude our ability to question some of their arguments. To-date we have been able to stand our ground.

Genocide, to the discredit of humanity, has existed in one form or another from the beginning of recorded history: whenever a victor in battle, or a dominant segment of a society would dominate, persecute, eradicate or enslave members of defeated nations or minorities within their own

¹ (cited by Professor Stephen Grove, The Problem of "Mental Harm" in the Genocide Convention, Washington U. Law Quarterly 174 Footnote 34)

society solely because of their status as members of a conquered nation, or on the basis of their religious or political beliefs, their ethnical or racial background, or their gender, or merely their general helplessness. Genocide, because it became so widely publicized by modern visual as well as aural communication, has been epitomized by the Nazis' calculated and cold blooded extermination of millions of members of the Jewish faith, not excluding hundreds of thousands of non-Jews who disagreed with this barbaric and uncivilized policy. It is on the heels of that extermination that the Genocide Convention was eventually adopted by the General Assembly of the United Nations in 1948, with the United States delegation in the forefront of the advocates for its adoption. The contemporaneous slaughter of the Polish Officer cadre at Katyn and the brutal repression and murder of millions of Russians by the Stalin regime undoubtedly also were a form of genocide. Unfortunately, we have had recurrent episodes of genocide up to this day often perpetrated by signatories of the Genocide Convention.

The problem with the ratification of the Genocide Convention is that while its aims are laudable, its definition of genocide is broad and vague, and has been limited by design so as not to apply to offending governments and to members of political or economic groups. Its application and enforcement are left to the erratic goodwill of the member states. The fact that the majority of the members of the United Nations have signed or ratified the Convention does not mean that it has been or is being enforced, except maybe selectively: destruction of whole segments of a population perceived to be political enemies of the State does not constitute genocide according to the Convention. Hence, Jews who are persecuted or destroyed because they are members of a political organization inimical to the dominant party in power, can be exterminated with impunity since they are not being destroyed as members of a religious or ethnic group "as such".

The problem is compounded insofar as the United States is concerned because of our unique legal system and the unquestioned supremacy our Constitution accords to treaties.

Should we ratify this Convention which, even if technically not self-executing, could take precedence over all of our existing laws, both federal and state? Would not ratification further elasticize current judicial interpretations of the United States Constitution given the seemingly limitless power of our judiciary to construe the "immutable" words of this cornerstone document? Once we face the fact that the Constitution is subject to the vagaries of interpretation by an all-powerful federal and state judiciary, a situation without parallel in the rest of the World, we realize that what we are doing here is more than engaging in mere academic speculation.

²E.g. The same treaty was held to be executory and self-executing by the Supreme Court: Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829); United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); one state (California) court held that the UN Charter was self-executing; the California Supreme Court, affirming the result on the basis of the 14th Amendment, found that Article 55 of the UN Charter was "not self-executing." Sei Fujii v. State, 217 P.2d 481 (1950); 242 P.2d 617 (1952)

My opposition to the ratification of the Genocide Convention stems from my view of the "sanctity" of treaties under our system and what it can do to our established system of law, and the fact that we appear willing to subject ourselves to this international burden without an appropriate *quid pro quo* from the other signatories to the Convention, many of whom have placed reservations on their ratification or accession, effectively nullifying this "treaty."

I. SHOULD THE TREATY MAKING POWER BE USED AS THE BASIS FOR ENACTMENT OF DOMESTIC LEGISLATION IN THE UNITED STATES?

It is a perversion of the treaty making power of the United States to use it to "legislate" in matters of municipal law.

We have, on the federal, state and even local levels, a plethora of legislation achieving all of the objectives of the Genocide Convention and designed to improve the quality of life of individuals in the United States.³ Why then ratify the Genocide Convention? All of the necessary legislation to outlaw genocide already exists in this country: these laws have been adopted and implemented pursuant to a process peculiar to American law and to American jurisprudence and are based on adherence to Constitutional tenets.

The Genocide Convention on the other hand is an amalgam of philosophical, political, and jurisprudential thinking which is not attuned to the thinking of our Founding Fathers when they spelled out the mechanism to guarantee individual rights afforded American citizens under the United States Constitution or, for that matter, acknowledged specifically the rights reserved to the states or their people. The legal thinking behind the Convention does not even conform to the current understanding of international law by most knowledgeable Americans.

Back in 1952, Judge Florence E. Allen, judge of the United States Court of Appeals for the Sixth Circuit, wrote in the preface to THE TREATY AS AN INSTRUMENT OF LEGISLATION:

"The device of legislating through treaty has come to be employed in increasing measure. Intricate problems, not only of international scope but of domestic character, such as local agriculture, labor and management, education and family life, are involved in treaties which the nations are asked to approve. Almost no phase of human life

³ Age Discrimination Act of 1975 with Amendments, 42 USC § 6101 et. seq.; Anti-Peonage Act (1867), 42 USC § 1994; Civil Rights Acts (generally), 42 U.S.C. §§ 1971 et. seq., 1975 et. seq., 1981 et. seq., 3601 et. seq.; Employment Security Act of 1960, (Unemployment Security) 26 USC §§ 3301 et. seq., 29 USC § 49d, 42 USC §§ 501, 1101 et. seq., 1301, 1321-1324, 1361-1364, 1367, 1371, 1400; Unemployment Compensation Act 42 USC 501 et. seq.; Social Security Act 42 USC 301 et. seq.; Environmental Quality Improvement Act (1920), 42 USC 4371 et. seq.; National School Lunch Act 42 U.S.C. 1751 et. seq.; Old Age Benefits Act 42 USC 401 et. seq.; Public Health & Welfare Act 42 USC 201 et. seq.; Housing Act 42 USC 1437 et. seq.; Voting Rights Act (1965); 42 USC 1971, 1973 et. seq.; Fair Labor Standards Act 29 USC 201 et. seq.; Equal Employment Opportunity Act 42 USC 2000 et. seq.;

escapes regulation by the treaties proposed. When the United Nations was formed it was contemplated that it should be a body of nations cooperating to establish world peace but that it should not be endowed with the authority to enact law. This was a power which no nation intended to yield to a world organization. Because of this, the United Nations possesses organs for certain limited executive powers, such as the Security Council and a Secretariat, and also a court; but it has no legislature. . . .

Since in the United States the treaty, when duly ratified and in force, under our constitution becomes a supreme law of the land, the treaty process presents special problems for the United States. It is urgent to consider now some of the critical questions raised by the increasing use of the treaty as a substitute for domestic legislation. Certain of the proposed treaties, such as a Draft Covenant on Human Rights and various conventions urged by the ILO for ratification, in some respects clearly encroach upon the domestic jurisdiction of the nations. This violates the spirit of Article 2, paragraph 7 of the Charter of the United Nations and also makes an improper use of the treaty process, which should be employed only in matters of international concern. Certain of these treaties, if ratified and effective, for the nations which ratify may curtail national independence in the domestic field to such a degree that eventually the harmony and peace of the world will be effected. . . . Our forefathers would understand the need for treaties which curtail the sovereign powers of nations with reference to international affairs; for instance, treaties which abolish the right to make war. They would not have understood innumerable presently proposed treaties which deal with essentially domestic questions. These treaties do not deal with such matters as boundaries, international fishing rights, maritime questions, international trade in narcotics, and international traffic in women and children, treaties of peace, cessions of property, and adjustment of post-war problems. These particular treaties, as later shown, require the individual ratifying country actually to change domestic laws and economic processes long established and developed by the particular genius of the particular state.

Treaties which deal in matters essentially domestic in character present harsh alternatives to governments asked to ratify them. To refuse to enact such treaties is to seem to be unwilling to cooperate in solving the world's problems. To ratify them may mean that the nation approving is yielding a portion of its independence of its domestic life."

I apologize for this lengthy excerpt but, in my opinion, it is difficult to improve upon. Judge Allen's thoughts should be ever present in the collective mind and wisdom of the United States Senate when it is asked to ratify any treaty.

While the Genocide Convention may not be self-executing according to current doctrine, it can be argued by some future lawyer that all of the existing legislation in the United States being in place there is no

need for additional legislation: that this treaty became law without the necessity of specific legislation which could not add to what is already in place, an argument which some judge may find persuasive.⁴

Ratification of a treaty, such as the Genocide Convention, puts us in an awkward position. A treaty becomes the supreme law of the United States; in most other countries a treaty to be enforceable must be specifically implemented by enabling legislation: a treaty is often worth the "piece of paper" in the immortal words of Chancellor Bismark. In the hands of some sovereigns a multilateral treaty, such as the Genocide Convention, becomes a tool for propaganda and manipulation of people in furtherance of the state's byzantine and machiavellian tactics to dominate the minds of the people of the world.

Even when words have the same meaning for people having a common philosophy, cultural differences may give a different content to such words; such a dichotomy is obviously more pronounced when those uttering them do not have the philosophical heritage that binds the nations of the Free World. Much of the rhetoric of Iron Curtain countries and even some nominally "Free World" countries may have an emotionally true-ringing sound to the unwary. The resort to "buzz" words that we know and cherish often have an entirely different meaning for members of other societies where the individual's rights are sharply curtailed. We tend to forget that in many legal systems the individual is not at the center of the Law's concern, but rather "society" is at the center of the law's purpose and the individual's rights are viewed solely in the light of that society's welfare as perceived by its government.

A statute is adopted, under our system, by a freely elected legislature and purports to regulate the affairs of the citizens of the state. A treaty with another nation, classically, regulates the relations of the United States with another sovereign nation. It is, therefore, much more a matter of contract law than a matter of the will of the people to regulate their activities inter sese. The Framers of the Constitution had this understanding of the purpose of treaties, yet subtle changes have been wrought in this concept.

The responsibility of the Senate in ratifying a treaty is spelled out in our Constitution. The purposely general language was a compromise of differing views among the American Revolutionaries and offered a viable mechanism at that time. However, when treaties go beyond dealings between sovereigns and assume an internal or municipal impact within the contracting sovereigns' territory this constitutional provision is no longer viable. The Founding Fathers felt that it would be next to impossible to get an unruly House of Representatives to be as "statesmanlike" as the Senate in the Nation's dealings with other countries. Even admitting the validity of that assumption it no longer holds true when treaties assume the character of domestic legislation.

To say that the nation binds itself by contract, with a foreign power, indefinitely, or for a term of years, or

⁴See Filartega v. Pena-Trala, 630 F.2d 876 (2d Cir. 1980) for an interesting example of judicial reasoning concerning novel areas of international law application to domestic U.S. law.

achieving a variety of objectives, including the adoption of appropriate domestic legislation, and the overruling of its supremacy in domestic matters, is very different from stating that the Nation binds itself to achieve external objectives involving the relationship between sovereigns. Under our unique system the treaty becomes the law of the land: the fact is that the contract between sovereigns achieves the status of paramount legislation; from this premise one may argue that a treaty can abrogate legislation within a sovereign's domestic purview, particularly if it is found that there are no limitations to the treaty-making power.

To the extent that a treaty abrogates state law or federal law enacted theretofore we tread on very sensitive constitutional grounds. (The Migratory Birds case well illustrates this concern).

Pronouncements to the contrary notwithstanding the Constitution does not enable the Executive, or the Legislative, or the Judicial Branches to wield powers other than the ones specifically granted to them by the Constitution, all other powers being reserved by the states "or the people". Concededly such "granted" powers have often been liberally construed by a Supreme Court eager to find an "implied" power to comfort a frustrated Executive.

Bear in mind, also, that there is a difference between "treaties" which are made on a bi-partite level and "conventions" which involve multilateral and diverse sovereign parties in this case members of the United Nations. Normal treaty negotiations are on a one-on-one basis with another nation; eventually a naturally satisfactory contractual arrangement is arrived at to settle differences or to agree to do certain positive things in cooperation with the other sovereign. This process of consensual bi-lateral agreement is much more difficult to achieve in the context of a convention where over a hundred nations participate in the "negotiations".

The United Nations is not a legislative body: it is an association of sovereigns who deal with each other in a sovereign capacity. The "participants" act along ideological or economic lines often without any regard to the substantive nature of a Convention: this greatly exacerbates the problem of definitions of terms. Two states, or even three and four, can substantially agree on a definition. When over one hundred nations adopt a vague compromise definition it becomes whatever it is in the eyes of the beholder: this is particularly true where historical background coupled with cultural differences, in addition to political or religious rhetoric, impose totally different meanings to identical words.

The close scrutiny and debate (at least its possibility) to which domestic legislation may be by and large subjected is absent where "legislation" is made on the Executive and Senatorial level, in derogation of Article I of the Constitution. Thus, the level at which the people through their elected representatives are made part of the "legislative process" is omitted.

A treaty which regulates the domestic affairs of a sovereign is, in fact, legislative in nature: if it cannot withstand the scrutiny of the domestic legislative process it should not be ratified, no matter how well intentioned the treaty may be.

Our system rests on the good faith and will of the Executive and the Senate, absent that, or even because of temporary aberration, treaties could be used to subvert domestic legislation: this leads me to conclude that the

Genocide Convention which is legislative in nature, as written, should not be ratified.

In construing the supremacy clause of the Constitution it has been argued that there is no limitation as to the treaty making power of the United States, its President and the Senate working together. If this is so, or potentially so, should the current interpretation of the Supreme Court in *Reid v. Covert*, 354 U.S. 1 (1957), be modified by a subsequent court decision, then we must be even more watchful and cautious of any treaty, more particularly with any convention or multilateral treaty, coming to us from the United Nations or any other international organization or component thereof, which in the name of high-minded "world" concern over individual rights aims at the internal affairs of sovereign nations in derogation of "international" law as understood by most other nations.

The motives or desires of the American Executive who may be pushing ratification for personal reasons, may not necessarily be related to national interest: it is up to the Senate to carefully assess the impact of a "treaty" on domestic legislation. This is not a perfunctory act of the Senate confirming a presidential appointee where it may be politically expedient to defer to the wishes of the occupant of the White House: the Constitution mandates the independent action of the Senate representing the legislative branch, to check the Executive's power. Concern with "the image" of the United States may be important but, in my opinion, public relations or similar niceties are not a proper subject matter of treaty-making, at least under our system.

Our judiciary, rightfully, has felt bound to consider a treaty the supreme law of the land. It is therefore not fanciful, to assume that a court might find that an interference in the domestic affairs of the States by the United States acting pursuant to a treaty is warranted under the Constitution: it cannot be flatly asserted that our judiciary will protect us against any encroachment of our constitutional system by way of unconstitutional "legislation". (E.g. Justice Holmes' majority opinion in the *Migratory Birds* case)

II. WOULD THE GENOCIDE CONVENTION ALTER THE BALANCE OF AUTHORITY BETWEEN THE STATES AND THE FEDERAL GOVERNMENT BY MAKING GENOCIDE AN INTERNATIONAL AND FEDERAL CRIME?

It is not too difficult to answer this question in the affirmative particularly if the word "would" were to be replaced by the more realistic word "could"? If one views the supremacy of the United States Constitution literally, and then looks at the subsequent extension of the Bill of Rights to state constitutions and state actions due to later interpretations of our courts, this is not a rhetorical question.

It is arguable whether genocide is an international crime in the absence of the Genocide Convention. By making genocide an "international crime" the Convention would then, on the domestic level, assume co-equal dignity with federal legislation and, by its very nature would control or add to whatever definition of civil rights crimes we may find within existing statutes. If we argue that all the necessary domestic legislation is in place to implement our commitment against the unspeakable crime of genocide, then all the convention adds is the "international crime" flavor to what is already a crime under our laws. All we accomplish is to add to the state and federal levels the "international" level, i.e. the "law of nations" as interpreted by some judge.

Traditionally, criminal law has been considered as being exclusively within the province of the states' sovereignty. Perceived interference by the federal judiciary into what used to be the exclusive province of state courts is justified on the basis that procedural defects or otherwise unconstitutional actions by a state government, which deprive an individual of his basic rights as a citizen of the United States (as distinguished from his rights as a citizen of the state) cannot be tolerated.

All persons, under our Constitution, are now protected by what is construed by the federal courts to relate to some basic federal constitutional rights. The Constitution is the tool of last resort to which a person, unjustly convicted, can point by invoking procedural or constitutional violations of his or her rights, in order to ensure a minimum quality of "national justice". This, however, is not to say that criminal law in the United States is federal. There is no federal common law of crimes other than whatever crimes have been construed as being against the "law of nations"; all other federal crimes are creatures of federal legislation. This is fairly basic but bears repeating.

If "federal law via treaty" defines genocide as a crime, this definition of and in itself will supersede all state laws and court decisions which may address themselves to that issue. As is, we have to-date regulated the protection of rights of individuals through the adoption of federal statutes protecting equal opportunity and equal treatment under the law, promoting and protecting the civil rights of all persons subject to our Constitution. The federal system has imposed upon the states standards of justice which one hopes the states would have adhered to on their own initiative; in view of the lack of concern by many states, this norm of minimal "national justice" was adopted, following the process prescribed under our Constitution. The Genocide Convention, ratified by the Senate, would not have to follow this constitutional road to implementation in order to become the law of the land. Even if the Convention is not self-executing, as claimed by its promoters, it will alter the balance between the states and the federal government if hasty federal legislation is rushed through Congress which often, adopts legislation for politically expedient reasons.

The states will have lost their authority to deal with the crime of genocide, not by legislation properly processed at the federal or state levels, but by a "treaty" negotiated (if this word can be used in the context of a convention) by admittedly well intentioned delegates appointed by the Executive.

It is not unfair to state that the Federal Executive whose business it is, among others, to see that its international relations are kept flowing smoothly may, on occasion, pay more attention to its image viewed from the national perspective of its role as "sovereign." In that exalted role, the custodians of the federal government may not pay too much attention to trifling matters involving individual rights of citizens or of the States, perceived to be largely the subject of academic legal debates.

Since all crimes fitting the definition of genocide are covered by either federal, state or local legislation what is the advantage of adding the vague and precatory wording of a multilateral "treaty" to this legal arsenal? What has happened to the concept that self government, at the local level, is essential to the survival of our way of life? Centralized government is the hallmark of most other societies, many of which are our allies and share our western Judeo-Christian heritage, but this is not our way.

Where minute municipal concerns are involved we still would like to rely on a tradition that has placed our nation in its unique position as a beacon of the "Free World". There are, of course, many areas of legitimate concern in which the federal government properly interferes in state and local activities: this has been done and, in the view of some, overdone. We have been able to survive judicially expanded interpretations involving the interstate commerce clause and other constitutional areas which have considerably tipped the balance of authority between the federal government and the state governments over the last five decades. Need we add alien legislation to this over-judicialization of our system? It would seem to me hardly consistent with the objectives of the current Administration to impose, from the top, national legislation by the treaty device.

When no enabling legislation is needed for a treaty to become "the supreme law of the land" upon ratification by the United States Senate, even a treaty which contravenes "interpreted" provisions of the United States Constitution may be declared to be the supreme law of the land. Nothing guarantees that a reversal of Reid by a Supreme Court more attuned to "the realities of the modern world" will not occur.

When the terms of a treaty, particularly a convention, deal with matters which are not truly "international", i.e. relationships between sovereigns, but directly affect domestic laws of a country, such treaties should not be considered to be "treaties" within the meaning of the Constitution until the adoption of appropriate legislation arrived at by the regular constitutional process provided for all other federal legislation. We have no constitutional provision providing for such legislative action at the state level since the power of making of treaties is reserved to the United States through the instrumentality of the President acting with the advice and consent of the Senate.

A convention should not be allowed to supersede any of the domestic laws of the United States protecting the right of its citizens within its territory, nor should a convention give our citizens an international forum, whether for propaganda or legitimate purposes, without a specific legislative enactment pursuant to our constitutional process.

III. DOES THE CONVENTION VIOLATE SPECIFIC AMENDMENTS TO THE CONSTITUTION?

The United States' political philosophy rests on the rock foundation of the Constitution and the Bill of Rights.

While I hesitate to categorically state that the Convention itself violates any of the Amendments to the Constitution, there is little doubt that the Courts have considerably changed the original thrust of the First, Fourth, Fifth, Sixth, Tenth and Fourteenth Amendments. However, this evolution has come from internal sources, i.e. the changes within our nation, and thus is a product of a unique American experience.

Our judiciary has virtually unlimited powers. This unique aspect of our judicial system, coupled with the adversary system encouraging advocates to be as creative as

they can be in dreaming up causes of action is really at the core of our problem. This vexing state of affairs is not helped by a constitutional provision which was not meant to cover "Conventions", a relatively modern invention. When everything is said and done, the fact is that the Constitution, not the Convention, is at the root of our quandary: life was much simpler in 1776. What we need is to amend the Constitution to align the treaty-power with more modern notions and to distinguish treaties from conventions.

A few random examples should suffice to illustrate the legitimate concerns as to the impact of the Convention on our Bill of Rights.

1. First Amendment.

While "incitement", as used in the Convention, is a word of art, nothing prevents a prosecutor or plaintiff, whether on the domestic or the international level, from bringing someone before a court on an "incitement" charge when, in fact, only a First Amendment freedom has been exercised: a concept which many foreign officials do not even comprehend.

The Courts have, over the years, labored to guarantee the existence of a free press and speech. This judicial concern may change.⁵ "Incitement" is fairly well construed under American law; it may be looked upon differently by authorities in other countries, including other English-speaking nations even those which share substantially in our views of what freedom of speech involves. The English Official Secrets Act for instance, would, I believe, violate our First Amendment rights were it to be adopted here.

2. Fifth Amendment.

Judicial minds and lawyers could very well conclude that the death penalty is a cruel and unusual punishment and is in violation of the Genocide Convention. Would not such an interpretation supersede American court interpretations to the contrary if adopted by the ICJ?

These are merely a very few illustrations of what are very real and substantial concerns. To give a detailed analysis in the very short time in which this statement had to be prepared vastly exceeds my resources. All we need, at this juncture, is to note what happened to the 10th Amendment at the hands of our judiciary to justify our concern. I would think that we should devote as much time and attention to study this very real danger as we have devoted to legislating this compromise convention. A commission of legal scholars, judges and practicing lawyers, knowledgeable in both domestic and international law, should be created and commissioned to submit its finding to the Senate within a reasonably short period of time.

⁵ See, e.g. Chief Justice Vinson's majority opinion in Feiner v. New York, 340 U.S. 315 (1950) and his dissenting opinion in Terminiello v. Chicago, 337 U.S. 1 (1948) and contrast it with Justice Holmes' decision in Fox v. Washington, 236 U.S. 273, if need exists to prove the fragility of the First Amendment guarantees as spelled out by the Warren Court with the current tendency of the Supreme Court to readjust the federalism in favor of "Law and Order".

IV. DOES RATIFICATION OF THE CONVENTION LIMIT OUR NATIONAL SOVEREIGNTY?

To the extent that we are mandated to change our own legislation as to what crimes constitute extraditable offenses, our national sovereignty is certainly infringed upon.

Regardless of the statements made by respected and well thinking scholars, we cannot look at the world through the windows of idealism but must face the world as it is: this should not deter us from working toward the kind of world order which would eventually ensure peace and the salvation of mankind.

Sovereignty is delegated when we subject ourselves to the jurisdiction of a tribunal, be it domestic or international. When a treaty provides for automatic jurisdiction over the actions of a sovereign then, of necessity, we have diminished sovereignty.

The Convention imposes upon the President the duty to enforce its terms and secure implementing legislation to that end (Article I). Congress is obligated to enact legislation to validate the provisions of the convention (Article V). Our courts have no choice but to interpret this legislation under the terms of the convention and the federal legislation implementing it. (The States of the Union are totally absent from this picture even though it affects aspects of their sovereignty which they have not given up). Article IX vests in the International Court of Justice final authority to interpret the terms of the Convention and such interpretations are, by the terms of the Convention, binding on our Executive, our Congress and our Courts. Any vestige of sovereignty sought to be retained by the much criticized "Connally" and "Vandenberg" reservations in relation to the ICJ is swept away. The USSR and its satellites have nullified the effectiveness of the Convention by their reservations to Article IX; should we do the same?

V. DOES THE CONVENTION MANDATE CHANGES IN THE INDEPENDENCE OF THE AMERICAN LEGAL SYSTEM?

Yes, it does to the extent that the definition of the crime of genocide used in the Convention impinges upon or adds to the definitions of "murder, homicide", and other assorted crimes, as these have come about through court interpretations both under our common law system and by virtue of statutory enactments, on the federal and the state levels.

To be blunt, it is our unique system, i.e. our Constitution, which is really the problem that we cannot ignore. This delicate and purely indigenous American political mechanism of government may very well make the strength of our nation; but, at the same time, in terms of protecting our domestic affairs from interference by way of treaties, the Constitution could very well be flawed.

Our constitutional system being what it is, it may be unrealistic to suggest amending the Constitution at this stage to provide for limitations to the treaty-making power of the United States. In any event, until this happens we must rely on the good will of the President and the wisdom of the Senate to ensure that no treaty is ratified which in any way conceivably interferes, directly or indirectly, with the domestic affairs of this country regardless of the noble objectives of the treaty and the good intentions of its supporters.

It seems to me that we have a surplus of federal, state and municipal legislation protecting individual rights of all kinds, including protection against genocide in any conceivable form. We do not need the addition of a treaty imposing upon us alien views as to what this crime really means. Some day, we will have to accept the concept of a Planetary Government and then we may have true "international law" which can be interpreted equitably and impartially by a true Internal Court of Justice and enforced impartially by an effective international police, in other words we will truly have a "World Order". This is not the system which exists now to ensure peace on earth, and we cannot unilaterally embrace what is largely still a utopian concept: this does not mean that we should not labor to achieve this goal. However, unilateral concessions by the United States, at this time, appear to me to be unwise if not downright destructive of our current constitutional system.

Despite the fact that it is the thinking of most thoughtful and eminent scholars and jurists that a treaty cannot contravene the Constitution of the United States, this is not a closed matter since it rests in large part on judicial construction and, I submit, this is not a legal theory which we need to litigate again before our courts.

The role of the Senate is crucial when it is asked to ratify a treaty, particularly when it is subjected to pressures by "world opinion" or other similarly irrelevant considerations. We lead the world by example: do we need the symbolism of a treaty which, according to its own proponents, is largely lame and ineffectual?

It is time for this country to stand up and point out to the world, without apology, that its internal system of legislation and judicial pronouncements under the Constitution of the United States and the constitutions of the several states fully guarantee the rights of all individuals within our borders: when our detractors can demonstrate the same then the time will be ripe for us to consider ratification of the Genocide Convention.

We should not be put on the defensive and be coerced into ratifying a convention just for the sake of a good public image. The business of the United Nations is to preserve peace, and to that extent the United States should and does cooperate fully as one sovereign should when dealing with other sovereigns in such matters. This does not, however, include the regulation of the conduct of individual American citizens within their country, a matter which, for the foreseeable future, is a purely domestic concern within the exclusive jurisdiction of the United States. If we want World Government, let us change our Constitution accordingly.

Under Article 2 § 7 of the United Nations Charter the member nations retain the absolute right to control their domestic affairs. We should not become involved in what are essentially partisan ideologically or economically fostered notions which by boot-strap logic try to establish the right of some outsiders to interfere in the internal affairs of a country on a selective basis. If we do not choose to do business with a country because of its government's oppression of its citizens, we should do so because of our own moral convictions and not because the United Nations tells us to do so. This is particularly true when we are, in fact, the only one that will be bound by such a commitment: this type of unequal international responsibility is not a burden we should have to carry, and we should not let ourselves be entrapped in such a situation.

VI. WHAT AMENDMENTS, RESERVATIONS, DECLARATIONS, OR UNDERSTANDINGS SHOULD BE ATTACHED TO THE GENOCIDE CONVENTION?

If we mean business, and the treaty is to be effective: none! However we cannot afford to ratify the Convention without qualification. If in a moment of weakness, the United States Senate were to decide to ratify the Genocide Convention for what its proponents readily admit, are essentially public relations purposes, then it seems to me that we ought to be careful to match this newly found cynicism with a number of written understandings, reservations, declarations and possibly even proposed amendments, not for the benefit of the other parties to the Convention who can, along with the ICJ ignore them, but in order to create an unmistakable record and legislative history for the benefit of our courts. However, the courts may find that the treaty mandates their ignoring this legislative record.

The problem with this unilateral changing of the plain meaning of the text of the Convention is that a substantial number of countries (including the USSR and its satellites, as well as a few of our "friends" or other types of allies with whom we share no ideological common ground) have done so, thus effectively taking themselves out from under the obligations of the Convention; other countries, most of which share our philosophy but not our constitutional problems, have protested such reservations and have declared that those nations that have made reservations, particularly as to Article IX, cannot be considered as signatories of the Convention. This presents the United States with a "no-win" situation.

Those who, rightfully, claim that reservations nullify the Convention happen to be our friends and allies and generally, countries with whom we share a similar political and cultural heritage. Those countries that have made reservations are, for the most part, countries of the Eastern block and countries with whose governments we do not sympathize because they are dictatorships of the left or the right, whose entire political philosophy is alien to our ways. What are we to do?

The public relations or propaganda aspects of this Convention are obvious and, possibly, the government of Kampuchea's views, in a brutally frank objection sent to the Secretary General of the United Nations on November 9, 1981, is telling, despite its hyperbole and strident tone:

"The government of Democratic Kampuchea, as a party to the Convention on the Prevention and Punishment of the Crime of Genocide, considers that the signing of the Convention by the Government of the Socialist Republic of Vietnam has no legal voice, because it is no more than a cynical, macabre charade intended to camouflage the foul crimes of genocide committed by the 250,000 soldiers of the Vietnamese invasion army in Kampuchea. It is an odious insult to the memory of the more than 2,500,000 Kampucheans who have been massacred by these same Vietnamese armed forces using conventional weapons, chemical weapons and the weapon of famine, created deliberately by them for the purpose of eliminating all national resistance at its source.

It is also a gross insult to hundreds of thousands of Laotians who have been massacred or compelled to take refuge abroad since the occupation of Laos by the Socialist Republic of Vietnam, to the Hmong national minority in Laos, exterminated by Vietnamese conventional and

chemical weapons and, finally, to over a million Vietnamese "boat people" who died at sea or sought refuge abroad in their flight to escape the repression carried out in VietNam by the Government of the Socialist Republic of Vietnam.

This shameless accession by the Socialist Republic of VietNam violates and discredits the noble principles and ideals of the United Nations and jeopardizes the prestige and moral authority of our World Organization. It represents an arrogant challenge to the International community, which is well aware of these crimes of genocides committed by the Vietnamese army in Kampuchea, has constantly denounced and condemned them since 25 December 1978, the date on which the Vietnamese invasion of Kampuchea began, and demands that these Vietnamese crimes of genocide be brought to an end by the total withdrawal of the Vietnamese forces from Kampuchea and to restoration of the inalienable right of the people of Kampuchea to decide its own destiny without any foreign interference, as provided in United Nations resolution 34/22, 35/6, and 36/5."

The following reservations, or understandings⁶ have been suggested, none of which satisfactorily answer the questions raised by the proposed ratification of the Convention.

1. "This treaty is hereby ratified with the understanding that under no circumstances can it be argued before a United States Court that this treaty in any way interferes with domestic law under the United States Constitution, its current interpretation by the Courts and existing federal legislation. It being further understood that this treaty will be implemented only to the extent that constitutionally adopted domestic legislation is enacted."

The Genocide Convention is a treaty that was clearly designed with a very worthwhile objective. The concern over the preservation of Canadian geese is now used as an argument that treaties can indeed deal with subject matters other than the relations between sovereigns. Morris B. Abram, current co-Chairman of the United States Commission on Civil Rights, testified in 1976 in favor of "immediate ratification of the Genocide Treaty. [If] this country can ratify treaties with respect to birds", he declared, "it can ratify treaties with respect to [human] beings." This is complemented by the self-serving and conclusory statement, in the 1984 edition of the "catechism" on the Genocide Convention published by the Conflict Analysis Center, in Washington, D.C., that "Genocide clearly is a proper subject for treaty negotiation" (p. 10, emphasis mine). In the face of such logic, my concerns are not "academic hair-splitting" or "nitpicking", but rather constitute a realistic appraisal of the situation.

2. The United States government understands and construes the words "intent to destroy, in whole or in part, international, ethnical, racial, religious group as such" appearing in Article II, to mean "the intent to destroy international, ethnical, racial or religious group by the

⁶Distinctions between the two terms are blurred when a treaty such as the Genocide Convention is involved. "Reservations" nullify the treaty; if our "understanding" does not change the plain meaning of the text it will be ignored both by the other parties and ICJ, but if it does limit or change the text then it becomes a "reservation".

acts specified in Article II in such a manner as to affect a substantial part of the group concerned."

This might take care of the problem of one individual being able to claim that he or she is a victim under the Genocide Convention or any one individual being sued in connection with an assault on another individual. It does not render a government accountable for the destruction of a group of people arguably identified as "political dissidents".

3. "It is the understanding of the United States that the ratification of the Genocide Convention does not mean that abortion, when it is done on a voluntary basis albeit with government support (financial, economic or legal) without any duress on the individuals involved, can be considered as a crime under the Genocide Convention unless so defined by the national and state legislations of the United States and it is therefore not to be included in the 'plain meaning' of the list of crimes covered by the Convention."

This should give pause for reflection to those who support either side of our domestic dispute in this constitutional and moral issue and might cause some shifting in the support or in the opposition to the ratification of this "treaty".

4. "The United States Government understands and construes the words 'mental harm', appearing in Article II(B) of this Convention, to mean permanent impairment of mental faculties."

Whether this resolves the problem of our jurisprudence in the area of "mental harm" causes of action is debatable.

5. "The United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in article V has been enacted."

Again, is this not an indirect nullification of the Convention?

6. "The United States Government understands and construes Article VI of the Convention in accordance with the agreed language of the Legal Committee of the United Nations General Assembly that nothing in article VI shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state."

Hopefully this might resolve the problem of concurrent jurisdiction in favor of the United States. What if the ICJ disagrees?

⁷ Judge Kauffman's review of the sources of international law which led him to conclude that official torture of people is prohibited by "the law of nations" and his observation that "courts must interpret international law not as it was in 1789 but as it has evolved and exists among the nations of the world today" [*Filartega v. Pena-Trala*, 630 F.2d 876 (2d Cir. 1980)] shows how far our judges' creativity can go in interpreting "international law" and the Constitution in order to assert jurisdiction over the acts of alien torturers against an alien plaintiff which acts occurred in their home country, Paraguay!

6. "The United States Government understands that the Genocide Convention does not, by its own terms, supersede or in any way supplement the existing language in any bi-lateral extradition treaty existing between the United States and other sovereigns, whether such powers are parties to the Genocide Convention or not. Such clarification to or addition of the crime genocide within any such extradition treaties will come about only after bi-lateral discussion, negotiation and agreement between the parties involved in accordance with the Constitution of the United States."

If this is not a reservation, what is?

7. "The United States Government states that it ratifies the Convention with the understanding that, in the event spurious charges of genocide are brought against its officials or citizens, the party guilty of such spurious charges will pay all costs and damages to the party against whom such charges were brought."

Since we are amending the convention why not throw this caveat into the hopper?

If the Senate cannot ratify the treaty without reservation, then it should not do so! Instead, the United States Congress should proclaim by joint resolution that our government should take steps to disassociate itself from any other government which engages in the international crime of genocide. If the Administration heeds your call we should experience an immense reduction of our expenses relating to foreign affairs since we would have to close a substantial number of embassies and thereby help to reduce our deficit: since the Grace commission did not think of that one, I offer it, *pro bono publico*, to Mr. Stockman who may wish to incorporate this suggestion in his next "cut the budget deficit" message.

8. Any reservation as to Article IX defeats the whole purpose of the Convention: this has been pointed out by the United Kingdom and by most governments friendly with, or allies of the United States.

9. Another reservation, equally destructive of the Convention, as to Article VI might read as follows: "With reference to Article VI the Government of the United States considers that the United States Courts and tribunals alone have jurisdiction with respect to acts of genocide committed within the territory of the United States."

The competence of International courts may be admitted exceptionally in those cases with respect to which the United States government has given its specific agreement."

Obviously it might be wiser to proceed by way of understandings and clarifications rather than by way of reservations, it being understood that, these clarifications and understandings since they bind no one but us are intended for domestic consumption, i.e. for the benefit of the American judiciary. Alas, we cannot even achieve this limited objective since a contrary interpretation by the ICJ would bind our judges. We cannot even prevent some creative legal mind to assert that, because of the "special" nature of this Convention or because of some implied power, any precatory language is to be interpreted as being mandatory, or *vice versa*.

As stated earlier, the problem with the ratification of this Convention has nothing to do with its substance but rather with our unique system of federal and state interaction incorporated in our Constitution which we have sworn to uphold.

CONCLUSION

In sum I think that it is a poor excuse to ratify a treaty for public relations purposes. It is difficult to believe that the proponents of ratification consider the public relations value of our ratifying the Convention to be of such paramount importance that this should be done without regard to its legal impact, arguably theoretical, on our system of justice and on our constitutional values.

Treaties should not be entered into lightly: the constitutional command as to their sanctity should preclude the United States from becoming a party to a charade.

Should we nevertheless be so imprudent as to proceed to ratification because of the pressures by admittedly well-intentioned lobbies and so-called "world opinion" then we must, regretfully, at the very least resort to "reservations" or "understandings", not so much for the world at large which does not care about or understand our constitutional system, but for the benefit of American judges who sometimes feel that they have been mandated to reshape the world from the all-powerful courtroom. This is not an area in which we need creative judges to change our system, but legislators who fully understand and debate any legislative changes within our constitutional mandates.

Therefore, why sign a useless document which has not, and will not achieve its proclaimed objectives? Let us be honest and send that "treaty" back to the international ash can from where it originated. Otherwise, let us amend our Constitution so that we can freely, and cynically, engage in the game of international rhetoric and propaganda.

Signed and Ratified or Accession or Succession
Without Reservations or Declarations

Afghanistan	Ghana	Nepal
Australia	Greece	Netherlands
Austria	Guatemala	New Zealand
Bahamas	Haiti	Nicaragua
Barbados	Honduras	Norway
Belgium	Iceland	Pakistan
Brazil	Iran	Panama
Canada	Iraq	Papua New Guinea
Chile	Ireland	Peru
Columbia	Israel	Korea
Costa Rica	Italy	St. Vincent/Grenadines
Cuba	Jamaica	Saudi Arabia
Cyprus	Jordan	Sri Lanka
Democratic Kampuchea	Laos	Sweden
Denmark	Lebanon	Syrian Arab Rep.
Ecuador	Lesotho	Tonga
Egypt	Liberia	Tunisia
El Salvador	Luxembourg	Turkey
Ethiopia	Mali	United Kingdom
Fiji	Mexico	Upper Volta
France	Monaco	Uruguay
Gambia	Mongolia	Yugoslavia
Federal Rep. of Germany		Zaire

SIGNED BUT NOT RATIFIED

Dominican Republic	December 11, 1948
Paraguay	December 11, 1948
United States	December 11, 1948

RESERVATIONS AND DECLARATIONS

Algeria	Albania	
Burma	Bulgaria	Burma (Art. VIII)
	Burma	
	Czechoslovakia	Finland (Constitution of Finland)
	Byelo Russian SSR	
	German Democratic Rep.	
	Hungary	
	India	
Morocco	Mongolia	Mongolia (Art. XI)
Philippines	Morocco	Philippines (Arts. IV & VII)
	Philippines	
	Poland	
	Romania	
	Rwanda	
	Spain	
	Ukrainian Soviet Socialist Rep.	
	USSR	
Venezuela	Venezuela	Venezuela (Art. VII)
	VietNam	VietNam (Art. XI)

RESPONSES BY RODOLPHE J.A. DE SEIFE TO WRITTEN QUESTIONS FROM SENATOR ORRIN G. HATCH

Question No. 1. Can a treaty affect or nullify the provisions of the state constitutions?

Answer. Yes. A treaty will override the provisions of any state constitution since a treaty becomes the Supreme Law of the Land. Any state constitution which is contrary to the terms and the language of the treaty will be nullified or will be affected so as to bring it in line with the treaty provisions, just as a federal law may affect or nullify the provisions of a state constitution. [United States Constitution, Art. VI, Cl. 2; *Owings v. Norwood's Lessee*, 5 Cranch 344; *McCulloch v. Maryland*, 4 Wheat. 316; *Foster v. Neilson*, 2 Peters 253, 314; *Cook v. Moffat*, 5 How. 295]

Question No. 2. Can a treaty affect or nullify a state statute?

Answer. Yes, of course. The same as any kind of federal legislation preempts a state's statute covering the same area. [*Ware v. Hylton*, 3 Dall. 199, 204 ("... it was by the Constitution of the United States of America, among other things, expressly declared that treaties which were then made, or should thereafter be made, under the authority of the United States should be the supreme law of the land, anything in said constitution, or of the laws of any state to the contrary notwithstanding * * *"); *Id.* at 237 ("* * * it is the declared duty of any of the State Judges to determine any Constitution, as the laws of any state, contrary to the treaty (or any other) made under the authority of the United States, null and void).]

Question No. 3. Can a treaty affect or nullify a prior judicial decision of a state supreme court?

Answer. Of course. As already stated a treaty is the supreme law of the land. Like any federal legislation it will affect or nullify any prior judicial decision of a state supreme court. [*Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Ware v. Hylton*, 3 Dall. 199 (1796).]

Question No. 4. Can a treaty affect or nullify existing federal legislation on the same subject?

Answer. Yes, indeed. A treaty affects or nullifies existing federal legislation on this same subject which is inconsistent with a treaty provision. This is not to say that later federal legislation on the same subject may not in turn abrogate a treaty provision. [*The Cherokee Tobacco*, 11 Wall. 616 (1870) ("* * * a law of Congress, repugnant to a treaty, to that extent abrogates it * * * a treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty"); *Foster & Elam v. Neilson*, 2 Peters 314 (1829).]

Question No. 5. Can a treaty increase the powers of the Federal Government at the expense of the states?

Answer. Not only can it do so, but we have history to prove that it does. The migratory birds case [*Missouri v. Holland*, 252 U.S. 416 (1920).] increased the powers of the federal government by the Supreme Court ignoring the Tenth Amendment. The dictum in *Reid* [*Reid v. Covert*, 354 U.S. 1 (1957).] is no help in saying that the holding of the migratory birds case by Justice Holmes has been limited to that case and has put a stop to increasing the powers of the federal government by way of treaty.

Question No. 6. Is a treaty or international agreement which conflicts with the constitution null and void?

Answer. At this point if one is to follow *Reid* then the answer would be yes. If one reads the comments of the framers of the Constitution the answer also would seem to be in the affirmative. However, nothing insures against the Supreme Court departing from the *Reid* dictum to return to Holmes' dissertation on the supremacy of treaties in the migratory birds case.

There is a difference between a conflict with the Constitution and a conflict with a Supreme Court decision, and a conflict with the Constitution exists only when our Supreme Court so decides. [*Martin v. Hunter's Lessee*, 1 Wheat. 304, 334; *Cohens v. Virginia*, 6 Wheat. 264; *Tennessee v. Davis*, 100 U.S. 257.]

Question No. 7. Is the power to make international agreements limited to a particular subject?

Answer. Yes. The framers of the Constitution, from Jefferson on down, have looked at international agreements as the agreements between sovereigns to regulate the conduct of each sovereign in relation to other sovereign, but never to get involved in the domestic affairs of the sovereign. The idea that sovereigns can legislate through treaty is relatively new; it was successfully tried in the migratory birds case and, now, in connection with the Genocide Convention it is held up as being an example of why the United States Government can validly engage in international agreements which extend beyond the normal subject for international agreements.

[See, generally, Tucker, *Limitations on the Treaty-Making Power*, (Boston, 1615); Cooley, *A Treatise on the Constitutional Limitations*, (6th ed. 1890).]

Question No. 8. The Genocide Convention makes any official or individual punishable for "direct and public incitement to commit genocide." Does this mean that if a member of Congress justifies the action of Jews killing Arabs in the Middle East that he can be prosecuted for genocide? What about the constitutional guarantee of freedom of speech? What about the freedom of the press?

Answer. As I have stated in my written statement it is possible that a member of Congress who would justify the action of Jews killing Arabs in the Middle East can be prosecuted for "incitement to commit genocide". It might depend on whether this is done in the United States or elsewhere. If it is done in the United States then presumably he would be judged by the American standard concerning "direct and public incitement". If however a member of Congress were to make the statement elsewhere, he or she would be tested under whatever "direct and public incitement" means in the language of that country, which could be any one of the five official languages, each one of which constitutes the official text of the convention. In addition it is not too far fetched to state that if an international code of justice were to define "direct and public incitement to commit genocide", it would be the controlling definition and binding on our courts by virtue of the treaty.

Our constitutional guarantee of freedom of speech as I stated in my answer to Senator Leahy, depends on our own jurisprudential body of Supreme Court opinions: the concept has been expanded and now may be somewhat restricted depending on what area of freedom of speech we're talking about. There would seem to be currently a tendency to restrict freedom of speech in areas involving national security. I will add, however, that the guarantee of free speech in the American sense is practically unknown in most of the world, as is "freedom of the press".

In sum, if we are judged by American standards in the United States, then I think that the American courts would interpret any such violations within the current doctrine, as expounded by the then existing Supreme Court with respect to the parameters of freedom of speech or freedom of the press. If we are involved in a foreign jurisdiction, the outcome is anyone's guess, but it certainly will not be the American standard.

It bears repeating that the convention being the supreme law of the land, a definition of "incitement" by an international code of justice or court of justice would be binding on our Supreme Court and, a fortiori, on the lower courts of our judicial system.

Question No. 9. Could the Genocide Convention lead to the creation of an international penal court for trails of American citizens for genocide without the constitutional safeguards and legal rights accorded persons charged with domestic crimes?

Answer. The Genocide Convention provides for the eventual creation of an international penal court [Article VI], and it would be up to the signatories to decide how and when this is to be done. If such an international penal court were to be created, it is possible that it may become, by treaty, the court of last resort for such crimes as may be declared to be within its jurisdiction. Article VIII of the Convention which "affirms the right of the United Nations to call upon an organ of the United Nations in matters within its jurisdiction" [Acting Secretary Webb's letter of transmittal to the President, appended to President Truman's transmittal to the Senate, June 16, 1949] suggests the possibility of enlarging the jurisdiction of "an organ of the United Nations" to encompass the crime of genocide.

Question No. 10. Would an American charged with the commission of genocide in the United States, be sent out of the country for trial before an international penal tribunal, if such a court were established, and its jurisdiction accepted by the United States under the Genocide Convention, in light of the Sixth Amendment to the United States Constitution which gives to every person accused "the right of a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed?"

Answer. This is not an easy question to answer. Theoretically an American could be extradited in order to stand trial before an international penal tribunal: this would depend on what exact jurisdiction such a tribunal might assert. It is no more fanciful to suggest that this is a real possibility than Judge Kauffman's assertion that a crime committed outside the United States by alien parties could be prosecuted in the United States. [*Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d. Cir., 1980).]

Question No. 11. Article IX of the Genocide Convention provides that disputes between parties to the Convention relating to "the interpretation, application, or fulfillment" of the Convention "shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." Does Article IX of the Geno-

cide Convention make the International Court of Justice, instead of the Supreme Court, the court of final appeal?

Answer. In all probability the answer has to be in the affirmative insofar as crimes of genocide are concerned. Otherwise, the International Court of Justice would not serve the purpose contemplated by the Convention.

Question No. 12. Does Article IX override Article III, Section 1, of the United States Constitution which states, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish;" and Article III, Section 2, which states: "The judicial powers shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made under their authority * * *?"

Answer. In matters of International law, Article IX would override the prerogatives of the United States Supreme Court. Whether this is a provision of the treaty which conflicts with the Constitution so as to make the treaty null and void would depend on the Supreme Court which would decide the case in which that question comes up.

Question No. 13. What will the United States gain by signing the Convention?

Answer. Nothing. Its proponents have publicly stated that the convention is a symbol and that it should be signed for its symbolic value. The United States has nothing to gain by signing this convention but, on the other hand, because our constitutional system is unique, it might invite a host of additional problems as far as our domestic legal system is concerned, something we don't need.

Question No. 14. What will the United States lose by not signing the Convention?

Answer. The United States will lose nothing by not signing the Convention. It will gain in credibility if it clearly stated why it is not ratifying the Convention: the United States Constitution does not provide for meaningless or symbolic treaties, therefore it would be demeaning of the United States Constitution to do so.

Question No. 15. Why is it undesirable to federalize criminal law?

Answer. Criminal law has been within the province of state law since this country was created. This is one area which is best served by the state systems with, as is the case now, a sort of supervisory capacity by the federal courts to see to it that the minimum requirements of justice guaranteed to American citizens, as opposed to state citizens, are respected. To create a federal criminal law system means the end of state sovereignties and the beginning of a centralized federal government at the national level, which is certainly not something that this administration would want to propose.

Question No. 16. What exactly is the legal status of the State Department's three understandings and one declaration?

Answer. At best, the State Department's understandings and declarations can be viewed as legislative history which might possibly bind our courts. They have no value from an international law viewpoint other than, that if we use the words "on the condition that", we may imply conditional ratification, an action which may be viewed by some as a reservation and therefore nullifying the treaty.

Question No. 17. What is the significance of the ICJ ruling on reservations?

Answer. In my opinion, the ICJ ruling on reservations means that reservations, as such, are meaningless and that a ratifying party is bound by the terms of the treaty as it is to be objectively interpreted. [See, generally, Sinclair, *The Vienna Convention on the Law of Treaties* (2d ed. 1984).]

Question No. 18. What is the significance of the ICJ's view of the universal application of the Convention?

Answer: This, of course, could have far reaching consequences. Even countries which have not ratified or are not signatories to the Convention are nevertheless bound by the terms of the convention which allegedly creates the international crime of genocide. [See, Sinclair, *Supra*, pp. 203-252; Rozakis, *The Concept of Just Cogens in the Law of Treaties*, (1976).]

Question No. 19. Could an international genocide tribunal be created by executive agreement?

Answer. Yes. There is precedent for it: the most recent instance is the executive agreement by which President Carter validly terminated ongoing legal proceedings in the U.S. courts against Iran and have all such claims referred to a special tribunal. [*Dames & Moore v. Regan*, 453 U.S. 657 (1981)]. Also, see generally, Note, Executive Authority in Foreign Affairs: *Dames & Moore v. Regan*, 8 Brooklyn J. Int'l L. 451 (1982).

Question No. 20. What difficulties might occur with foreign diplomats and dignitaries (i.e., Israeli and British) in the United States under the Convention?

Answer. There could be at least some difficulties if a request were made to extradite such diplomats and dignitaries to a country claiming that they were guilty of genocide. One would have to look at the fact situation involved, namely if this is an individual who is accredited to the United States, does his immunity as a diplomat prevail? Does immunity of a foreign dignitary on a visit to this country prevail? All this is uncertain. It could be held that a visiting diplomat and dignitary is not immune to service of process. This question would have to be answered on a case by case basis. The point, of course, is that it could happen and would create, at the very least, an embarrassment to the United States.

RESPONSES BY RODOLPHE J.A. DE SEIFE TO WRITTEN QUESTIONS FROM SENATOR
CHARLES E. GRASSLEY

Question No. 1. Could an individual be prosecuted for the crime of genocide under the treaty, before an international tribunal, when his crime consisted of a single act against a single individual?

Answer. As drafted, the genocide convention does apparently permit the prosecution of an individual even if the act complained of consisted of a single act against a single individual. This has been elicited over the years by numerous statements of witnesses appearing before the Senate Foreign Relations Committee and is the reason behind the proposed reservation that the number involved must be "substantial" before the crime of genocide might be alleged.

Question No. 2. Does the absence of "political" group persecutions in the genocide definition, mean that designation of an individual or ethnic group as an "enemy of the state," and subsequent persecutions of that group, would escape international prosecution for the crime of genocide under the treaty?

Answer. Yes. The fact that the definition of genocide does not include "political" group persecution does not permit a state to designate a group as "an enemy of the state" and therefore act outside the applicability of the convention. Incidentally, something ought to be said about the absence in the genocide definition of the word "economic group". Obviously a regime in power can arbitrarily kill or harm individuals belonging to a certain economic group which it views as an impediment to social change and then state, with a little bit of creativity, that these actions escape the application of the genocide convention. Whether or not the inclusion of these words in the definition of genocide is desirable, at this stage, is from my own viewpoint, something that should be explored more fully.

Question No. 3. If this is true, could Hitler have designated Jews as enemies of the state, and then systematically pursued their "extermination," unfettered by any provision of the Genocide Convention, if it was then in effect?

Answer. Yes. From the foregoing testimony it is obvious and has been obvious all along, that the Jews could have been persecuted by Hitler merely by being labeled as "enemies of the state". Therefore, even had the Genocide Convention been in existence (absent policy declarations which were openly made by the Nazi government as to why Jews were being persecuted) Hitlerites could easily have acted outside the jurisdiction of our Genocide Convention.

Question No. 4. Would the Raj of India be permitted to execute all Sikhs as "enemies of the state" following the assassination of Indira Ghandi, rather than as an ethnic or religious group?

Answer. Yes. As stated above, the answer will have to be in the affirmative.

Question No. 5. Was it the east-block, or communists nations, that objected to the inclusion of "political" persecution in the Convention, as has been alleged?

Answer. Yes. In the early part of the discussions which eventually resulted in the adoption of the Genocide Convention, U.N. Document 20 which was published as document A/401, A/401/abd.1, 2 and 3 dated 27 September 1947 the United States took the position that "considerable question has been raised as to whether 'political' groups should be included in the definition. The United States is able to agree to the inclusion of political groups on the understanding that genocide as to such groups is confined to physical destruction."

History supports the contention that the communist nations, including East Block nations, objected to the inclusion "political" persecution in the convention as an attempt to limit the sovereignty of the state and bringing into the arena of international crime definition what is considered, in socialist nations, a legitimate way for the government to overcome opposition by organized groups.

Question No. 6. Why are convention's terms aimed at individuals, rather than governments, when it is difficult to imagine genocide being conducted against a whole segment of a population without the cooperation of the state? On the theory that a "corporation" or "entity" cannot be guilty of a crime?

Answer. The theory behind this exclusion of government liability from the definition of genocide was primarily a communist nations view that a state is a legal entity as much as a "corporation", and such "entity" cannot be guilty of a crime.

Question No. 7. Was it the Soviets that objected to the language "with the complicity of government" to the Genocide definition?

Answer. Yes. Yes the soviets were objecting to the "language with the complicity of government" to the Genocide convention and is largely due to their intractable position that the American delegation yielded and agreed to do away with this language so as to make it easier for the soviets to sign the convention.

Question No. 8. Would ratification of the treaty supersede all previous treaties and acts of Congress that are inconsistent with its terms, including bilateral extradition treaties with other nations?

Answer. Yes. If we take the view that it is the most recent law that prevails, then I would state that this could very well include bilateral extradition treaties but for the language in the convention which specifically states that the genocide convention would be consistent with the terms of existing extradition treaties which, presumably, might have to be amended in order to implement the states' responsibilities under the convention.

Question No. 9. Would any person charged with genocide be tried before an international tribunal, even if they are tried by their own nation for the same or an underlying act?

Answer. Possibly. It would be possible for a person to be tried before an international tribunal even if they're tried by their own nation for the same act. This certainly was true in the United States where for the longest time people were prosecuted under a crime which was declared to be a federal crime and then were also tried in the state courts, e.g. the Smith Act and the so-called Little Smith Acts.

Question No. 10. If this is true, would that not offend the Constitution's provisions against "double jeopardy"?

Answer. Many countries do not have any protection against "double jeopardy."

Question No. 11. Would a person who commits murder of a person or group of persons because of a racial or religious hatred, in one of our states, be tried for genocide in a federal court rather than murder or mass murder in the state in which the violence occurred?

Answer. Probably. If we are faced with a new definition of a crime which overrides local definitions of murder it would seem to me that this is the crime for which such a person would have to be tried.

Question No. 12. Would a person tried in United States courts for the act for genocide, be accorded the constitutional and legal protections that an accused defendant enjoys for other crimes under U.S. law?

Answer. Yes, there is no reason to believe otherwise. The problem is that it would, however, result in possibly different instructions to a jury which might to some extent, prove to be amendatory of existing criminal rights.

Question No. 13. Would a person accused of the crime of genocide before an international tribunal be accorded the protection an accused person has in the United States, even if he is a U.S. citizen and the crime or crimes occurred within U.S. jurisdiction?

Answer. No. It is obvious that an international tribunal would have to hear a case under its own rules and these may or may not give such protections depends on how that tribunal is set up.

Question No. 14. Would a Congressionally passed statute expanding the rights of the accused, or an evidentiary rule of a judge that expands those rights, in a prosecution of an individual in U.S. courts for the act of genocide, subject to the legislators or judges to prosecution as well?

Answer. It is possible that by a broad interpretation of the convention that liability could be incurred by legislators or judges for acts which might be perceived as coming within the ambit of the Genocide Convention.

Question No. 15. Would American military personnel, serving in time of war, be subject to punishment for the crime of genocide for acts that involve the taking of life of enemy troops, or the forced relocation of civilian populations in a "war zone"?

Answer. Yes. At this time there is no distinction between civilians and military personnel.

Question No. 16. Would the treaty be self-executing, or would legislation be needed to enforce the Genocide Convention as it applies to the United States?

Answer. By its terms the treaty is executory. It could however be argued that it is self-executing since all the operative laws are in place.

Question No. 17. Would ratification subject any citizen of the United States accused of this crime to international jurisdiction, without the possibility of the United States to object to the jurisdiction of the tribunal?

Answer. Ratification could subject a citizen of the United States to international jurisdiction. Unless a specific reservation is made, the United States might be precluded to object to the jurisdiction of such an international tribunal.

Question No. 18. Would the state of Israel, or any of its officials and citizens be subject to international prosecution under the Genocide Convention, upon the complaint of Yassir Arafat or the P.L.O., that its West Bank settlement policies constitute genocide against the Palestinian people?

Answer. Yes.

Question No. 19. If so, would Prime Minister Peres, or other Israeli official be subject to arrest while visiting the United States, and subsequent extradition, upon the complaint of the P.L.O.?

Answer. It is a possible scenario of a highly speculative nature. What could happen is that such charges could be brought for political propaganda purposes in order to embarrass our allies and us.

Question No. 20. Could the actions of this government to reduce budgetary deficits by reducing entitlement or other social welfare programs that tend to disproportionately benefit ethnic or religious groups, constitute genocide?

Answer. Certainly the argument can be made by those who claim to defend or represent the rights of certain minority groups that to reduce entitlements could be equated to of "genocide" if such cuts affect one group more than another.

Question No. 21. Given that the Nuremberg Declarations found that the promotion of abortions among minority populations amounted to genocide, could not the location of abortion facilities in neighborhoods that are primarily made up of one race, constitute Genocide?

Answer. Yes. There is little doubt that this argument can and will be made.

Question No. 22. Do you believe that had this treaty been in effect, and Germany a party to it in the 1930's, that Hitler would have been prevented from pursuing the elimination of the Jewish people, and the others that were persecuted?

Answer. As I stated earlier, I do not believe that Hitler would have been prevented from pursuing the elimination of the Jewish people and all others that were persecuted under his regime.

Question No. 23. Do you believe that Stalin would have been prevented from fostering the mass-starvation and executions of the Ukraine?

Answer. The same answer applies. Mass-starvation is not currently prevented in Ethiopia by a government that sees some of the tribes that are starving as being political enemies.

Question No. 24. Do you believe that the mass executions of the Cultural Revolution in the People's Republic of China could have been prevented by this treaty?

Answer. No.

Question No. 25. Why were not the mass executions of Kampuchea stopped by the Genocide Convention?

Answer. Aside from the fact that the Genocide Convention has no teeth and that is a symbol, as claimed by the proponents of ratification, from a legal viewpoint, by excluding government from the genocide definition, the International Court of Justice has no jurisdiction over individuals.

Question No. 26. Why is the persecution of the Mesquito Indians in Nicaragua not the subject of a genocide prosecution right now?

Answer. The same answer as above pertains.

Question No. 27. Does the advocacy of religious or racial hatred, constitute an act of Genocide under the Treaty's "incitement" provision, and thereby violate the First Amendment's protection of "free speech" regardless of how offensive the speaker is?

Answer. Yes, it is possible if not probable.

Question No. 28. Does the treaty permit the United Nations or other international tribunal, to cite the United States or any individual or government official, for genocide, by failing to act to pass legislation implementing the treaty?

Answer. Yes, it could very well happen and the scenario is not difficult to imagine as a legal argument in order to embarrass the establishment.

Question No. 29. What would constitute "causing mental harm" under the provisions of the treaty?

Answer. This is a question which from the American viewpoint is not easy to answer; it depends on the latest court decisions or statutes in this area. The fact that the Convention is written in five languages, each one constituting the official text of the convention, means that we may have slightly different interpretations.

Question No. 30. Would the failure of the United States to act to restrain the persecution of a people in another country, subject the President or the Secretary of State to prosecution for an act of genocide before an international tribunal?

Answer. It is possible that the President or the Secretary of State because of their failure to actually restrain the persecution of a people in another country might be cited for an act of genocide before an international tribunal. Certainly this can be done, if for no other reason, for political propaganda purposes.

I thank you for this opportunity to answer your questions. I believe that several of these questions have already been answered by me in more extensive form either in my written statement or in my previous answers to Senator Hatch: I trust that this will prove satisfactory.

RESPONSES BY RODOLPHE J.A. DE SEIFE TO A WRITTEN QUESTION FROM SENATOR
PATRICK LEAHY

Question. Professor, I am particularly interested in your discussion of the First Amendment, which I consider, more than any single provision, the basis for all of our other liberties.

You state on page 13 of your testimony that the "incitement" language of the Genocide Convention might lead a court to find some form of proper First Amendment expression to be an "incitement."

Since the ratification of the Convention would not amount to an amendment of the Constitution, why isn't it a complete answer to your hypothetical case that any legal action seeking to narrow First Amendment freedoms, whether based on a novel theory or some action by Congress, is subject to the supervening authority of the Constitution?

Couldn't your fears on this account, as will as fears with respect to other constitutional provisions, be dealt with by a careful legislative history?

Answer. I do not believe that these fears can be adequately dealt with by a careful legislative history, as you suggest, Senator Leahy.

It is because I share your deep concern and your conviction that the first amendment is the cornerstone of our freedoms under the constitution that I raised the "incitement" issue, in page 13 of my prepared statement.

The American concept of freedom of speech is not shared by most countries. Even in the United States there is division among people as to the proper boundaries of free speech: the Supreme Court opinions have constantly evolved over the years (see the *Fox* and *Feiner* cases cited in the footnote on page 13 of my prepared statement).

Arguably, with the convention having assumed the status of "supreme law of the land" it is the ICJ's opinion as to what constitutes "incitement" under the convention which might be controlling. Supreme Court opinions interpreting the Constitution do not occupy the exalted position of the written constitution and the treaty. Our Supreme Court may find an ICJ interpretation of the convention binding, thereby nullifying whatever legislative history we are building here.

In sum, legislative history is merely a tool to help our courts to ferret out the legislative intent when a statute is couched in terms which may be subject to different interpretations depending on the context, e.g. "may" and "shall." Under the plain meaning rule, legislative history is not binding on the Court. If we agree to the supremacy of the ICJ's determinations then our courts are bound by such rulings on "international law."

The ICJ owes no difference to any legislative history or pronouncements of the United States Senate nor is it bound by any ruling of the United States Supreme Court, let alone any other American court in matters which are exclusively within its jurisdiction such as the interpretation of the Genocide Convention since, according to the proponents of ratification who are testifying here, genocide is an "international crime" the interpretation of which can only be given authoritatively by the International Court of Justice, the place where the genocide "buck" stops, to paraphrase the late President Truman.

It is because of the very serious impact which the convention will have on our domestic legal system, a problem unique to the United States because of its constitution, that I conclude that the Senate should not ratify this "symbol" because there is no room within our legal and constitutional framework for "symbolic" treaties: the United States has no option under its constitution but to take every treaty it ratifies very seriously and national honor mandates our compliance.

Senator HATCH. I would like to interrupt for a moment so Senator Grassley can ask a question.

Senator GRASSLEY. Thank you, Mr. Chairman, and I appreciate the indulgence of the committee in granting me this opportunity.

I guess I would like to express a view that this treaty has been before the Senate for a long period of time. In my 10 years in the Congress, this is the first time it has gotten the attention it is getting because of an effort to get it ratified. I think it was 10 years ago that the last effort was made to get it ratified. So we tend to concentrate on those things that are just before us. This issue is coming up again, and we are really going to focus on it.

I have been impressed in all my years in the House or Senate as I have toured my district or State holding town meetings, if I had to think of issues that have consistently come up over a 10-year period of time there would always be a person attending who would be against it, but the people who were really for it would not be around, so you can't make a judgment based on that. We have to make a studied judgment. But I guess I have been impressed that there is literature that has raised questions that I am not sure have been answered, but they have been raised. As a representative of my people, I want to know whether that point of view is right or wrong.

One of the issues is something I think you just referred to and I would like to have you and one of the other people who is for the treaty comment on this recent issue that has been brought to my attention, and that is the exemption for political crimes, if that is the right term, the exemption for political crimes in that somehow the East bloc would be exempt from a lot of things that maybe the United States could be accused of, because we don't seek an exemption.

I think maybe what you just mentioned about the murder of so many people in Kampuchea is an example of something that would be considered a political crime and would not be considered under the treaty, the same as what Hitler did to 6 million Jews, for example. I would like to have that issue addressed for both the people who would agree with that point of view, and those who would disagree with that point of view, that political crimes are or are not exempt and the extent to which that is beneficial to the Eastern bloc and excludes them from the treaty and, yet, because of the way we under our rule of law move forward, we would be guilty of a lot of things that maybe other nations would not be.

I don't care who answers first, but I would like to have one pro and one con. I should not say pro and con. I should have an answer on both sides of that issue.

Professor MOORE. Mr. Chairman, since I speak for the Convention, let me try to answer your question.

First, I think that there have been over the years a number of questions that have been raised by people who have sincerely been concerned about the Genocide Convention. I think those issues have been definitively answered in terms of any significant, serious question under the U.S. Constitution or other legal issues.

For example, when this issue initially came up at the time of the Bricker amendment debate back in the 1950's, at that point, there had been no definitive Supreme Court decision saying the Constitution of the United States prevailed over any treaty obligation in terms of domestic law of the United States. We have a clear deci-

sion in *Reid v. Covert* in 1957. The quotation one sometimes hears from John Foster Dulles in the famous Louisville, KY speech that the treaty will override the Constitution, those are simply no longer plausible views. It is absolutely not the constitutional law of the United States. I think that kind of thing gave rise to some concern, but has not been definitively resolved.

There was also a concern about the power of certain treaties to give greater authority in the Federal Government particularly in the human rights area, at a time when that was far more sensitive in our history in terms of the civil rights debate than it is today. Now we take for granted a strong network of civil rights laws—the strongest in the world—in the United States.

One thing we do know in that debate about this Convention is that it is completely not self-executing. It will have no effect whatever in the courts without the implementing legislation that you as a member of this committee and the Congress as a whole will be able to shape. So I think that really is not as serious an issue as many felt it was at the time that issue was initially raised.

With respect to the political crimes exception on extradition, that comes from article VII of the Convention. It simply says that genocide and other acts enumerated in article III shall not be considered political crimes for purposes of extradition. What that means is one is obligated to try in their own domestic courts if it happens to be one of their own nationals, or to extradite and that the extradition will not be held up by your making a claim that this is political. That is something the United States has always strongly favored. There has never been any discussion of a possible reservation of that. It would be grotesque to assume that somehow we would not extradite persons guilty of the crime of genocide, let's say, that took place in another country by a foreign national, that country requests them back for trial and the United States says no, we won't extradite because it is political.

I might say under every single one of our extradition treaties, the United States will not routinely extradite until it decides itself this is not a frivolous political charge. Not that you have a defense for genocide because you claim the act was political, but we will look to see whether the charge that is brought is politically motivated and if it is politically motivated and frivolous, there will be no extradition under U.S. extradition treaties, so I think there is very important protection under that clause.

Mr. DE SEIFE. Senator Grassley, in response to your question, the definition of the Genocide Convention which provides that certain people who belong to certain groups, namely, ethnic, religious and a couple of others, excludes political groups and, in my opinion, should also have included economic groups because of the words "as such" at the end of the Genocide Convention, what this means is that you cannot persecute a Jew because he is a Jew, or a Jew "as such," a member of the Jewish race "as such," but it is fine to kill a Jew who is a member of X, Y, Z freedom party because he is an enemy of the regime.

Senator HATCH. Or enemy of the state.

Mr. DE SEIFE. Or enemy of the state. This is very important. If you talk about leadership, that is what the United States should have done—stuck by its gun—because a political group is very im-

portant. It is not just political crime. Insofar as political crime is concerned, I would like to point out that in American criminal law there is no such thing as political murder. Murder is murder. Political as a motivation of murder is not a defense. Therefore, if another country comes to us under our current extradition treaties and asks us to extradite a person for murder, no matter whether it is political or not, if it is murder within our understanding, we extradite.

I testified in a case, a couple of years ago, in Virginia on the extradition treaty with France. There is no doubt that if one is guilty of murder under our law in France—a country which permits the defense of political crime—if the French came to us and asked us to extradite someone guilty of political murder, as far as we are concerned, we would extradite. So much for the extradition issue.

Again, since we do it any way, who needs the treaty? The treaty, Senator Grassley, is meaningless. It is worthless. It does not add one thing to the situation we have today.

I would like to point out one more thing, if I may, in response to Professor Moore about things being clear as to the law. We, as lawyers, know that nothing is clear as to the law, and there is no such thing as saying that the Genocide Convention is clearly non-self-executing or executory. The Supreme Court years ago had problems finding one treaty self-executing then executory. The California Supreme Court found article 55, I believe, of the United National Charter, to be not self-executing after the lower court found that it was self-executing. There are legitimate debates about it. There is nothing clear. I wish it were.

Senator HATCH. Professor Murphy and Professor Friedlander, we would like to hear from you, too.

Mr. MURPHY. I would like to address Senator Grassley's primary concern. Your concern is that the United States might be subject to certain charges or that there might be discrimination under this convention against the United States. I think it is clear that the obligations on the United States and the obligations on the Soviet Union would be precisely the same, except for article IX regarding the International Court of Justice, because the Soviet Union has made a reservation to the courts' jurisdiction. As Professor Moore pointed out, this reservation brings into question their good-faith ratification of the Convention.

While it is unfortunate that the Genocide Convention does not cover genocide based on the political views of a target group, it is important to recognize that it does cover genocide which has been historically and is today important, that is, genocide against national, ethnic, racial, or religious groups, I think it would be unfortunate not to ratify the Convention, because, if we had our druthers, we would have a better Convention.

Thank you, Mr. Chairman.

Mr. FRIEDLANDER. Senator Grassley, my concern under article VII is that political opponents of an incumbent regime may or could under the Genocide Convention be accused of acts of genocide. I would suggest a reservation that political opponents of an incumbent regime be exempted from the charge of genocide in that kind of situation. I think the definitions and descriptions of genocide and the related activities are so vague and overbroad, they

cover almost any kind of crime in almost any kind of political dissent. That is how I understood your question, and that is part of my concern.

Senator GRASSLEY. My last point, I assume, and understand that I am not a lawyer, but I assume, in the case of the 90 nations who have signed this, that as far as those nations are concerned, it is part of their legal system and they are bound by it. To that extent, has there ever been any action brought against any individual or any country under the Genocide Convention in the 30 years that it has existed?

Mr. MURPHY. Not that I know of.

Senator GRASSLEY. If it is the great document it ought to be and maybe I should be asking you this, if it is the great document that it is, what difference does it make if the United States ratifies it or not? We have agreed to it, but we have not ratified it.

If in 30 years 90 nations have signed it and it has not been used at all, there are just as many nations that are signatories to it that abide by the rule of law as we do, why wouldn't a lot of western nations generally use it?

Professor MOORE. Senator, I think the answer to that question is that we are not able, as we in this room would like to be, to completely control genocide and eliminate it from the face of the Earth. I have no doubt that all of us in this hearing room would do that if it were within our power. The United States can only take those actions that are within its power to seek to achieve that goal. One of those actions that is in our power—that creates no constitutional or legal problems for the United States and that is extremely important morally and important to end a series of disinformation campaigns against our country's record in human rights—is to go forward with ratification of this convention.

I have no illusion in making that recommendation that the U.S. ratification will end genocide. I do believe very strongly as an American who takes great pride in my country and the human rights record of my country that this is an action that is in the right direction and will make at the margin a difference. We must continue to increase the pressure on grotesque totalitarian regimes.

I also think frankly that we should look carefully at the past record of not bringing actions under this convention. I personally would recommend that the United States, if it accedes to this convention, bring an action against the Sandinista leadership in the International Court of Justice for genocide against the Miskito Indians, and I believe the facts support that.

Senator HATCH. Let me interrupt a moment. You mentioned Kampuchea. Why have not any of these 90 countries come out against the atrocities that occurred there?

Professor MOORE. That is a very good point, and I would argue I think there should have been a case filed in the International Court of Justice against the Khmer Rouge.

Senator HATCH. Professor de Seife you indicated that the convention is going to be used solely against us. It will not make any difference to the Soviet Union, the Khmer Rouge, the East bloc countries, or to any number of other atrocity-committing nations. They will just ignore it. Obviously, what I am worried about more than anything else is having to fight battles such as I did in 1983 against

an Arab resolution brought up before the International Labor Organization for the sole purpose of embarrassing Israel. I am concerned that Israel will be constantly attacked and nothing will be done about atrocities committed by other Communist nations.

Professor MOORE. Israel was one of the first nations to ratify the Genocide Convention. I am not aware that any case of genocide has ever been brought against Israel.

Senator HATCH. I understand they are very concerned today. I see it being a constant propaganda tool against Israel, against the United States, against everybody who believes in civil rights, human rights, and everybody who is against genocide while the others get away scot-free.

Professor MOORE. I happen to agree with you on the disinformation and the campaign against democracies. I agree with that.

Senator HATCH. Some people feel Israel had every right to go into Lebanon, but I suspect the minute Israel again protects its peripheral borders, it will have this Convention raised against it in the world court. Syria on the other hand, can do anything it wants to do, Iraq can do anything it wants to do because they don't care what happens in the world.

Professor MOORE. One thing I would point out, quite apart from our speculations or judgments as to what might happen in the future——

Senator HATCH. I guarantee that the next time Israel moves into Lebanon or tries to protect itself, it will be maligned in the world court.

Professor MOORE. As I noted, Mr. Chairman I am not aware that a single case charging genocide against Israel ever has been brought before the world court. One thing that has been happening with some regularity is that the Soviet Union and those leading this disinformation campaign against the democracies have been using the U.S. nonratification of this treaty to deflect our criticism of their human rights.

Senator HATCH. Your point is well-taken that if we don't ratify, we have a very difficult time utilizing this Convention. On the other hand, if we do ratify then everybody can utilize it against us, our allies, and Israel. I foresee the Convention being used to constantly berate Israel and ourselves.

Professor MOORE. I tend to agree with Ambassador Kirkpatrick's approach that the answer is for the democracies to honestly take on the Soviet disinformation schemes and those of the other totalitarian regimes and tell the truth about their behavior.

Senator HATCH. I agree, but we are the only ones that get slapped around.

Professor MOORE. I don't think it is true, Mr. Chairman. If that were the case, I would be very concerned about it.

Senator HATCH. You are saying if that would be the case, you would probably be against ratification of this treaty yourself, but you don't believe that is the case.

Professor MOORE. Frankly, Mr. Chairman, I think it is just the totalitarian states that have the fear of the Genocide Convention. The democracies do not commit genocide and are not going to commit genocide. We do not need to fear the Genocide Convention.

Senator HATCH. Would Hitler have abided by the treaty? The Russians don't care. The PLO does not seem to care. What do they care if you go and make some propaganda points in the world court? It does not mean anything to them. It won't stop them.

Professor MOORE. I think the question is how we continue to add on additional policies to try to stop the behavior, Mr. Chairman. I think this is an important additional policy to try to get at that genocidal behavior. The United States does not have any constitutional or legal problems in doing this. I see no problem in doing this. Why should we, as you pointed out in terms for 30 years, not do everything in our power to fight the totalitarian countries engaged in this type of activity? Why not go after them more seriously. That is what I think our country should do.

Senator HATCH. Let me turn to Dr. Murphy.

John F. Murphy is currently a professor of law at Villanova Law School. Prior to going into teaching, he spent a year on a fellowship in India, practiced law in New York City and Washington, DC, and served as an attorney in the legal advisor's office, Department of State. He is the author of "The United Nations and the Control of International Violence" (1983) and coeditor—with Alona E. Evans—and contributor to "Legal Aspects of International Terrorism" (1978).

Professor Murphy, let's take your testimony at this time, and then we will turn to Professor Friedlander.

STATEMENT OF JOHN F. MURPHY, PROFESSOR OF LAW, VILLANOVA UNIVERSITY

Mr. MURPHY. I did not mean to cut off the interesting discussion you were having with Professor Moore and Professor de Seife. In fact, I would like to return to it if I might.

You have my written statement that responds to the six questions you have raised.

Senator HATCH. Your full statement will also be placed in the record.

Mr. MURPHY. I would like to address this question of possible dangers for the United States in ratifying this Convention. Would it put us at a disadvantage in dealing with irresponsible charges of genocide? Some persons have expressed the concern that ratification of this convention would put the United States at a disadvantage in international forums, subject it to irresponsible charges of genocide because of its ratification of the Genocide Convention.

I think this is simply incorrect. It is important to keep in mind when addressing this issue the possible forums in which charges against the United States might be raised. It is highly unlikely that such charges would be brought against the United States before the International Court of Justice, because the Court would interpret and apply this Convention in a responsible way.

Conversely, as Professor Moore has indicated, we might want to consider bringing charges against Nicaragua and Kampuchea, countries that may well be violating the Genocide Convention.

There is also the fact of irresponsible charges in the United Nations itself and in a specialized agency such as the International Labor Organization.

I would suggest that U.S. ratification of this Convention, as has been the case with Israel, would have little effect on irresponsible political charges. Those charges have been brought and will continue to be brought by our adversaries in these basically political organs of the world community.

On the other hand, as Professor Moore suggested, U.S. ratification of the Genocide Convention might help us to respond to those charges and perhaps would enhance our ability to go on the counterattack in these political forums.

So, I do not see any dangers in terms of U.S. foreign policy, in ratifying the Genocide Convention. I see some benefits for example, more precision given to the definition of genocide. It could be utilized either in the world court or the political organs of the U.N.

Let me turn very briefly to this question of what might the United States gain from ratification. Some of these points have already been covered. I would like to address the question of ratification being a PR exercise or a symbolic act. I would suggest that ratification would not be a public relations exercise, but an important step toward reaffirming general principles of law that we first supported in the London Charter that set up the Nuremberg trials. We should remember that leading Nazi officials were tried and convicted of crimes against humanity which were the forerunner of the genocide concept. Is important for the United States to reaffirm its commitment to combat that type of act, so the symbolic importance of ratification would be significant.

There is a distressing tendency for treaties to be ratified and then for no further action to be taken. One sees this in the area of antiterrorist treaties. These treaties have to be utilized if they are to be effective tools for combating international crime. This should be done in the case of genocide and in the case of our antiterrorism effort.

In the time remaining, Mr. Chairman, I would like to turn to what was going to be the first part of my statement and try to address another major concern that has been expressed in this constitutional area, and that is the question of the propriety of making genocide an international crime under U.S. law. It is important to recognize that in a sense calling genocide an international crime is a misnomer. It is true that at Nuremberg it was called a crime against humanity and identified as an international crime, by an international tribunal set up on a temporary ad hoc basis. But since that time no permanent international crime court has been established. Under the Genocide Convention states are required to define genocide under national law and through implementing legislation to punish those acts of genocide that occur within their territory or to extradite to the territory of the place where the acts occurred in the event they apprehend an alleged perpetrator of genocide in their territory.

So the Genocide Convention sets up a framework for possible international cooperation in dealing with individuals who commit genocidal acts. It has not been utilized, as has been recognized here. Perhaps it should be.

Basically, the question addressed by the Genocide Convention can be broadly described as a problem of apprehending, prosecuting and punishing criminals who operate internationally because, if a

genocidal act is committed in the territory of the country that apprehends the individual, that person would be tried under domestic law which, in accordance with the treaty, would include the crime of genocide; but the same act might also qualify as murder, assault and battery, or other domestic crimes.

As to the problem of extradition, the Convention could be a bit more precise than it is. It seems to require in article VII that extradition be back to the territory where the crime was committed or to an international criminal tribunal which has not been established. Literally read, article VII provides no option for the country which apprehends an alleged perpetrator of genocide to try him unless the crime was committed in its territory. It has been suggested that the United States should include an understanding in its instrument of ratification that would allow the United States to try its own nationals for the crime of genocide. I would support such an understanding.

Upon reflection, I think we ought to give some thought to the possibility of an understanding that there is nothing in article VII which would preclude the United States from trying any individual regardless of nationality, for genocide under its law. This would be in keeping with the idea that genocide is a crime against the world community, the same as piracy.

The antiterrorist conventions, such as the conventions against aircraft hijackings or sabotage, provide for the extradite or prosecute approach to these crimes. That is, the state where the individual has been apprehended has its choice. It can either extradite that person back to where the crime was committed, or it can assert jurisdiction over that person on the ground the crime is subject to the jurisdiction of any state that apprehends the alleged offender. It would make sense to apply this approach to genocide, despite the literal language of article VII which might be interpreted to the contrary.

I see my time is up, Senator. I will finish on this point.

At this late date, there is nothing particularly revolutionary about the Genocide Convention. In the antiterrorism area, there are a number of laws on the books which provide for the prosecution and punishment of individuals who take hostages, individuals who attack diplomats, individuals who hijack airplanes. This prosecution is carried out in accordance with the terms of U.S. legislation. So, in a sense, the question of whether the Genocide Convention is or is not self-executing is beside the point. It would be executed by the passage of Federal legislation.

It is clear that the United States would not become a party to the Genocide Convention until such time as implementing legislation to provide the basis for the prosecution is in place. This is an important point. There is no question that Congress can constitutionally enact such legislation under its authority to define crimes against the law of nations.

[The prepared statement of Mr. Murphy and responses to written questions follow:]

PREPARED STATEMENT OF JOHN F. MURPHY

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear before you today to address some of the constitutional issues that have arisen with respect to the question whether the Senate should give its advice and consent to United States ratification of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). Since you have asked for my reactions to six specific questions, I will limit my testimony this morning to these questions. I would be pleased, however, to respond to any other questions you might have regarding either the constitutional or international law dimensions of the Genocide Convention.

Before I turn to the six specific questions you have asked, I would like to say that I agree with the many eminent commentators who have stated that there are no constitutional impediments to United States ratification of the Convention. As you know, the debate over the constitutionality of United States ratification has been waging since at least 1949, when President Truman submitted the Genocide Convention to the Senate for its advice and consent. In my opinion, and with all due respect to my colleagues who hold a contrary opinion, any possible doubt regarding the constitutionality of United States ratification should have been dispelled by now.

Let me turn now to the six questions.

Question 1. Should the treaty making power be used as the basis for the enactment of domestic legislation in the United States?

Answer. The treaty making power is not being used as the basis for the enactment of domestic legislation in the United States. Rather, the enactment of domestic legislation is often necessary for the United States to fulfill its obligations under a treaty. Also, if a treaty is non-self-executing, the enactment of domestic regulation is necessary for the treaty to become the

supreme law of the land under Article VI of the U.S. Constitution.

Moreover, the Supreme Court has held that a treaty cannot itself enact domestic criminal law and that only Congress can enforce treaty obligations by penal sanctions. United States v. Hudson and Goodwin, 7 Cranch 32 (U.S. 1812); United States v. Coolidge, 1 Wheat 415 (U.S. 816); L. Henkin, *Foreign Affairs and the Constitution* 159 (1972). Article V of the Genocide Convention expressly requires the parties "to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention" A similar obligation is found in other conventions establishing international crimes that the United States has ratified. Recent examples include the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (Article 3) and the International Convention Against the Taking of Hostages (Article 5).

Question 2. Would the Genocide Convention alter the balance of authority between states and the federal government by making genocide an international and federal crime?

Answer. No. It is generally agreed, as reflected in draft implementing legislation, that the states and the federal government would have concurrent jurisdiction over the crime of genocide. Also, Article I, section 8, clause 10, of the Constitution expressly authorizes Congress to define and punish offenses against the law of nations. As noted above, Congress has recently exercised this authority in passing implementing legislation for the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents and The International Convention Against the Taking of Hostages.

Question 3. Would the Genocide Convention violate specific amendments to the United States Constitution?

Answer. No. The Convention itself recognizes, in Article V, that states parties' obligation to enact implementing legislation shall be carried out only "in accordance with their respective Constitutions." Moreover, the Supreme Court has ruled that the Constitution is supreme over a treaty in any case of conflict. Reid v. Covert, 354 U.S. 1, 17, (1957).

In any event the Convention nowhere violates specific amendments to the Constitution. Some have claimed that the Convention's ban in Article II on "causing serious . . . mental harm" to a people, or its criminalizing in Article III of "incitement to commit genocide," violates the Constitution's First Amendment guarantee of freedom of expression. These contentions are not well founded. The drafting history of the Convention clearly shows, and it is generally agreed among states parties, that "mental harm" is to be construed to cover only physical injury to the brain, particularly through the forced use of mind-altering drugs, with the intention of destroying an ethnic, national, racial, or religious group. To lend a further measure of support to this interpretation, the Senate Foreign Relations Committee has proposed that the following understanding be attached to the United States instrument of ratification: "the United States government understands and construes the words 'mental harm' appearing in Article II(b) of this Convention to mean permanent impairment of mental faculties."

As to the "incitement" clause, the drafting history of the Convention indicates that this language was inserted at the insistence of the American delegation. An early draft of Article III would have prohibited all forms of public propaganda encouraging genocide - a provision that would clearly violate the First Amendment to the Constitution. The present language avoids such problems. Although advocacy is constitutionally protected, no matter how reprehensible, incitement to a crime is not. In Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), the Supreme Court laid to rest any doubts on this matter when it held that the

First Amendment covers "advocacy . . . of law violation," but does not extend to "advocacy [which] is directed to inciting . . . lawless action." This ruling reaffirmed Justice Brandeis' warning in Whitney v. California, 274 U.S. 357, 375-76 (1927), that "the wide divergence between advocacy and incitement . . . must be borne in mind." A year after the Supreme Court's decision in Brandenburg, then Assistant Attorney General William F. Rehnquist, testifying on behalf of the Department of Justice, stated categorically that freedom of speech as protected by the Constitution "could not be and . . . would not be" endangered in any way by the terms of the Convention.

Parenthetically, it may be noted that some critics have contended that the Convention's Article II definition of genocide as the perpetration of certain actions intended to destroy "a national, ethnical, racial or religious group in whole or in part" might permit a prosecution for genocide for the murder of one or two people and, as a result, should be viewed as unconstitutional on the ground of vagueness. This contention also has no merit. The "in whole or in part" language is indispensable. Without it, destruction of the whole group would be required, and perpetrators of genocide could not be prosecuted if even one member of the group survived. It does not follow, however, that the murder of one or two people of the group would be sufficient to constitute the crime. To underline this point, the Senate Foreign Relations Committee has proposed that an understanding be attached to the ratification instrument providing that "the United States Government understands and construes the words 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such' appearing in Article II, to mean the intent to destroy a national, ethnical, racial or religious group by the acts specified in Article II in such manner as to affect a substantial part of the group concerned."

Question 4. Would ratification of the Convention place limits on United States national sovereignty?

Answer. No. It is unclear precisely what is meant by this question, but it appears to reflect a concern expressed by some commentators over Article IX of the Convention, which provides that "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." In their view this article would somehow infringe United States national sovereignty. This is patently not the case. The United States is currently a party to some forty multilateral treaties and other international agreements containing provisions for submission of disputes to the International Court of Justice, and the United States Government has actively supported inclusion of such provisions in multilateral treaties; it has been the Communist bloc countries that have opposed these provisions.

It is true that the Connelly Amendment to United States acceptance of the compulsory jurisdiction of the International Court of Justice would not apply to Article IX of the Genocide Convention. Hence, the United States would not have the right to reserve to itself the decision whether a dispute over genocide was essentially within its jurisdiction. This is appropriate because, by ratifying the Convention, the United States would proclaim its view that genocide is a matter of international concern. This would not be for the first time. The United States prosecuted high ranking Nazi defendants at Nuremberg for crimes against humanity - the forerunner to genocide. It voted for the United Nations General Assembly's 1948 resolution proclaiming genocide to be a crime under international law. There simply can be no doubt, at this stage in our history, that genocide is a crime under international law.

Some critics have also expressed a concern that, if the United States ratified the Convention, our adversaries would

bring baseless claims before the International Court of Justice against us. Perhaps they might. But, there is nothing in the history of its jurisprudence to indicate that the Court would uphold such claims. If the Court were to act in such an irresponsible fashion, the United States would be perfectly justified in refusing to recognize the judgment and could block its enforcement by veto in the Security Council, the organ charged under Article 94 of the United Nations Charter with enforcement of judgments of the Court. Indeed, if the Court were to render such a judgment, the United States would be well advised to consider withdrawing its acceptance of the Court's compulsory jurisdiction. But the simple fact is that the Court cannot reasonably be expected to issue any such decision.

Perhaps a word should be said about Article VIII of the Convention, which provides that "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III." Some critics have argued that, were the United States to ratify the Convention, adversaries would rush to the United Nations with charges of genocide. But the competence of the United Nations to entertain such charges is in no way dependent upon the Convention. Moreover, Article III of the Convention does not enhance or diminish United Nations competence to take action under its charter to prevent and suppress acts of genocide. The Convention's narrow definition of genocide should serve to discourage rather than encourage baseless charges of genocide.

Question 5. Would the Convention mandate changes in the independence of the American legal system?

Answer. No. To some extent, my answer to Question 4 may be applicable to this question as well. In addition, the question may reflect a concern over Articles VI and VII of the Convention. These Articles provide:

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Some critics have interpreted these articles as requiring the United States to extradite its nationals to states, Vietnam is an often cited example, that would bring baseless charges of genocide, or to an international penal tribunal. This interpretation is incorrect. No international penal tribunal has been established, nor is one likely to be established in the foreseeable future. If one were to be established, the United States would have to accept its jurisdiction before any U.S. national could be brought before it. Only states can be parties to proceedings before the International Court of Justice.

Read literally the language of Article VI of the Convention would appear to limit trial other than by a competent international penal tribunal to a tribunal of the state in which the crime was committed. However, the drafting history of this provision indicates that it was not intended to affect the rights of a state party to try its nationals before its own courts. In accordance with this drafting history, the Senate Foreign Relations Committee has recommended that the following understanding be attached to the instrument of ratification: "That the United States Government understands and construes Article VI of the Convention in accordance with the agreed language of the Report of the Legal Committee of the United Nations General Assembly that nothing in Article VI shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State."

Moreover, Article VII of the Convention provides that states parties are obligated to extradite a person accused of genocide "in accordance with their laws and treaties in force." The Genocide Convention is not itself an extradition treaty. Under United States law, extradition take place only in accordance with bilateral extradition treaties. No extradition treaty exists between the United States and many of the states that might bring groundless charges against U.S. nationals. Indeed, genocide is currently not listed as a crime covered by any extradition treaty to which the United States is a party. Accordingly, U.S. extradition treaties will have to be amended to include genocide within the crimes covered by the treaty, and the Senate will have to give its advice and consent to these amendments.

There are six recently concluded treaties, those with Costa Rica, Ireland, Italy, Jamaica, Sweden, and Thailand, which contain a general formula under which extradition would lie for offenses that are crimes punishable in both the United States and the other country for more than a specified period of imprisonment. Under this formula genocide would be covered as an extraditable offense if made a crime under United States law and the law of the other country.

Even if all U.S. extradition treaties included genocide as an extraditable offense, the United States would not be obligated to extradite a person to a country seeking him for purposes of persecution on political grounds. This is a well established doctrine of U.S. extradition law. Also, implementing legislation proposed by the Senate Foreign Relations Committee in 1976 would have expressed the sense of Congress that the Secretary of State, in negotiating extradition treaties, should reserve the right to refuse extradition of a U.S. national to a foreign country for genocide on the understanding that the United States would prosecute a person whose surrender was sought. Any new implementing legislation could and should contain a similar provision.

Question 6. What amendments, reservations, declarations, or understandings should be attached to the U.S. instrument ratifying the Genocide Convention?

Answer. After a lengthy and extensive review, the Reagan Administration has decided not to recommend any changes in the three understandings and the one declaration proposed by the Senate Foreign Relations Committee in 1976. In its report of September 24, 1984, the Senate Foreign Relations Committee has agreed. The three understandings and the declaration are:

(1) That the United States Government understands and construes the words "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in Article II, to mean the intent to destroy a national, ethnical, racial, or religious group by the acts specified in Article II in such manner as to affect a substantial part of the group concerned.

(2) That the United States Government understands and construes the words "mental harm" appearing in Article II(b) of this Convention to mean permanent impairment of mental faculties.

(3) That the United States Government understands and construes Article VI of the Convention in accordance with the agreed language of the Report of the Legal Committee of the United Nations General Assembly that nothing in Article VI shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State.

(4) That the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in Article V has been enacted.

In my view these understandings and declaration should be more than sufficient to resolve any possible problems concerning ambiguities contained in the Genocide Convention. For domestic criminal law purposes the implementing legislation should be drafted with a view towards insuring full protection of the rights of an accused while fulfilling the obligation of the United States under the Convention to take steps to prevent and punish the crime of genocide.

* * * *

In closing, Mr. Chairman, I would like to express my hope that U.S. ratification of the Convention will be only the first step towards more effective efforts to prevent and punish

genocidal acts. As others have pointed out, the Convention's value, up to this point, has been purely symbolic. It has not been used as a basis for the prosecution of persons accused of genocide. Nor has it stimulated suits before the International Court of Justice or charges before the political organs of the United Nations that a particular state party--and there are several possible candidates--bears international responsibility for genocide. The time has come to go beyond merely symbolic acts and to take effective steps against genocide. Only when this stage has been reached will the promise that the United States and its allies made at Nuremberg to combat crimes against humanity be fulfilled.

RESPONSES BY JOHN F. MURPHY TO WRITTEN QUESTIONS FROM SENATOR ORRIN G. HATCH

Question No. 1. Can a Treaty Affect or Nullify the Provisions of the States Constitution?

Answer. Under Article VI of the U.S. Constitution, the so-called supremacy clause, a treaty that has come into effect in the United States clearly prevails over any conflicting state law, including state constitutions. This is clear from the terms of the first paragraph of Article VI, which provide; "This Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Question No. 2. Can a Treaty Affect or Nullify a State Statute?

Answer. The answer to this question is the same as that given to question No. 1.

Question No. 3. Can a Treaty Affect or Nullify a Prior Judicial Decision of a State Supreme Court?

Answer. The answer to this question is the same as that given to question No. 2.

Question No. 4. Can a Treaty Affect or Nullify Existing Federal Legislation on the Same Subject?

Answer. The United States Supreme Court has explicitly held, for example, in *Whitney v. Robertson*, 124 U.S. 190 (1888), that, under Article VI of the U.S. Constitution, treaties and federal legislation have the same status, and thus, in case of conflict, the so-called last-in-time rule prevails. That is, whichever has come into force the latest in time prevails in case of conflict. Accordingly, if a treaty is ratified and comes into force under United States law at a time subsequent to enactment of federal legislation, then in case of conflict, the treaty would prevail. Conversely, if federal legislation is adopted subsequent to the time of a treaty coming into force, then in case of conflict, the federal legislation would prevail. It should be noted, however, that this should not be a problem with respect to the Genocide Convention because it is generally agreed that the Convention would not be ratified by the United States until such time as implementing legislation has been adopted. Under these circumstances, there would be no possible conflict between the Convention and federal legislation.

Question No. 5. Can a Treaty Increase the Powers of the Federal Government at the Expense of the States?

Answer. No. Ratification of a treaty does not increase the powers of the Federal Government. The powers of the Federal Government regarding ratification of treaties are clearly spelled out in the United States Constitution. Ratification of a treaty is merely an exercise of these powers; it in no way increases Federal powers.

Question No. 6. Is a Treaty or Other International Agreement Which Conflicts with the Constitution Null and Void?

Answer. Yes. The United States Supreme Court has explicitly so held in *Reid v. Covert*, 354 U.S. 1, 17 (1957). Moreover, as indicated in the hearings before the Senate Judiciary Subcommittee on the Constitution, there is no respectable opinion holding otherwise.

Question No. 7. Is the Power to Make International Agreements Limited to Particular Subjects?

Answer. In *Geoffrey v. Riggs*, 133 U.S. 258, 267 (1890), the Supreme Court held that, "the treaty power of the United States extends to all proper subjects of negotiation between the government and the governments of other nations. . . ." It has generally been understood that there are some subjects that would not be appropriate for negotiation between the United States and other nations, although there has never been any agreement as to what these subjects might be.

In any event, genocide clearly is a proper subject for a treaty negotiation. At the Nuremberg trials, the United States and the allied powers, in accordance with international agreement, prosecuted and punished leading Nazi officials for the crime against humanity—the forerunner of the crime of genocide. Moreover, it is generally understood that genocide is a heinous crime against the vital interests of the entire world community. There can be no reasonable doubt that international cooperation is vitally needed to combat this scourge of humanity.

Question No. 8. The Genocide Convention makes any Official or Individual Punishable for "Direct and Public Incitement to Commit Genocide." Does this mean that if a member of Congress justifies the action of Jews killing Arabs in the Middle East that he can be prosecuted for genocide? What about the constitutional guarantee of freedom of speech? What about freedom of the press?

Answer. As discussed at substantial length during the hearings, the language, "direct and public incitement to commit genocide," is taken from the language of the Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), and was inserted in the Genocide Convention at the insistence of the United States delegation in order to avoid any problems of freedom of speech or freedom of the press. The distinction that this language makes is between advocacy of genocide, which would not be covered by the Convention and would be protected by the First Amendment's guarantees of freedom of speech and of the press, and direct incitement to the imminent crime of genocide. The court in *Brandenburg* indicated that direct incitement to crime would not have constitutional protection, and there would seem to be no policy reason for such protection. A member of Congress justifying the action of Jews killing Arabs in the Middle East would not constitute even the advocacy of genocide. Even if it could be construed as advocacy of genocide, it would not fall within the coverage of the Genocide Convention.

Question No. 9. Could the Genocide Convention Lead to the Creation of an International Penal Court for Trials of American Citizens for Genocide Without the Constitutional Safeguards and Legal Rights Accorded Persons Charged with Domestic Crime?

Answer. The Genocide Convention does envisage, in Article VI, the possible creation of an international penal court for the trial of persons accused of genocide. However, no such international penal tribunal has been established; nor is there any significant support among nation states at this time for creation of such a tribunal. In the unlikely event that such a tribunal were to be established, no American citizen could be submitted to it for trial unless the United States expressly agreed to the court's jurisdiction. Whether the United States should agree to the jurisdiction of such a court is a complex issue which would be taken up if such a tribunal were to be established.

Question No. 10. Would an American Charged with Commission of Genocide in the United States, be sent out of the Country for Trial before an International Penal Tribunal, if such a Court were Established, and its Jurisdiction accepted by the United States Under the Genocide Convention, in light of the Sixth Amendment to the U.S. Constitutional which Gives to Every Person Accused the Right to a Speedy and Public Trial by an Impartial Jury of the State and District wherein the Crime Shall have been Committed?

Answer. In large part my answer to question No. 9 will serve as an answer to this question as well. In addition, I should emphasize that United States acceptance of the jurisdiction of an international penal tribunal would not take place under the Genocide Convention; rather, it is an issue separate and distinct from United States' ratification of the Genocide Convention. Ratification of the Genocide Convention would not commit the United States to acceptance of the jurisdiction of an international penal tribunal were one to be created.

Question No. 11. Article IX of the Genocide Convention Provides that Disputes Between Parties to the Convention Relating to the "Interpretation, Application, or

Fulfillment" of the Convention "Shall be Submitted to the International Court of Justice at the Request of any of the Parties to the Dispute."

Does Article IX of the Genocide Convention make the International Court of Justice, instead of the Supreme Court, the Court of Final Appeal?

Answer. No. There is nothing revolutionary about Article IX of the Genocide Convention. Similar clauses are found in at least 40 multilateral conventions to which the United States is already a party. Under these clauses, the international court of justice does not serve as an appeal tribunal from a decision of the United States Supreme Court. Rather, the World Court is simply a dispute mechanism for the settlement of disputes between states parties to the Convention relating to the interpretation, application, or fulfillment of the Genocide Convention, a function entirely appropriate for it.

Question No. 12. Does Article IX Override Article III, Section 1, of the U.S. Constitution Which States, "The Judicial Power of the United States Shall be Vested in One Supreme Court, and in Such Inferior Courts as the Congress may from Time to Time Ordain and Establish"; and Article III Section 2, which States, "The Judicial Power Shall Extend to all Cases, in Law and Equity, Arising Under the Constitution, the Laws of the United States, and Treaties made, or which shall be under their Authority . . . ?"

Answer. No. Although, under these provisions, the U.S. Judiciary has the authority to consider disputes relating to the interpretation or application of treaties to which the U.S. is a party, this does not preclude such disputes coming before the International Court of Justice, in situations where the dispute is between the United States Government and another state party to the treaty. This has been understood ever since the creation of the International Court of Justice and is the basis for U.S. acceptance of the compulsory jurisdiction of the International Court of Justice as well as the U.S. acceptance of compromissory clauses in 40 multilateral treaties mentioned earlier.

Question No. 13. What will the United States gain by Signing the Convention?

Answer. The United States will gain substantially by becoming a party to the Genocide Convention. First, by ratification, it will reaffirm its stance taken at the Nuremberg trials that genocide is a crime against humanity that the world community needs to combat and suppress. Nonratification by the United States has proven to be an embarrassment to the conduct of U.S. foreign policy, which the Soviet Union, among other adversaries of the United States, has used to good effect. Second, by ratification of the Genocide Convention, the United States will be able to utilize its terms to challenge those states parties that commit genocide or permit genocide to be committed within their territory. In addition, it would be especially embarrassing to the conduct of United States foreign policy for the Genocide Convention to be rejected now when the Reagan Administration has strongly supported its ratification and our friends and allies expect the United States to become a part to the Convention.

Question 14. What will the United States Lose by not Signing the Convention?

Answer. By not ratifying the Genocide Convention, the United States would lose the benefits, described in my answer to question 14, it could gain by ratification. Also, nonratification would continue as an embarrassment and hindrance to U.S. foreign policy.

Question 15. Why is it Undesirable to Federalize Criminal Law?

Answer. Ratification of the Genocide Convention and the adoption of implementing legislation would not federalize criminal law. Genocide is not currently defined as a crime under either federal or state law. Ratification of the Convention and the passage of implementing legislation would, to be sure, make the commission of genocide a federal crime. However, as discussed during the hearings, the implementing legislation would not preempt any state law that would establish the crime of genocide. Rather, there would be concurrent federal and state jurisdiction over the crime. This is the approach that has already been taken with respect to international terrorism. For example, implementing legislation for the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, and for the International Convention Against the Taking of Hostages, specifically disavows any intention to preempt state jurisdiction over these crimes.

Question 16. What Exactly is the Legal Status of the State Department's Three Understandings and One Declaration?

Answer. The State Department's proposed three understandings and one declaration have no legal status until such time as they are incorporated as part of the United States instrument of ratification. At that time the three understandings would constitute the United States interpretation of specific provisions of the Genocide Convention.

cide Convention. If another state party disagreed with these interpretations, there would be a dispute between the United States and such a state party that could be settled either through negotiations or perhaps referral of the dispute to the International Court of Justice. However, no objection to these understandings is expected.

As for the declaration, this would serve as notice to other states parties to the Genocide Convention that the United States would not become a party to the Convention until such time as implementing legislation has been adopted by Congress.

Question 17. What is the Significance of the ICJ Rulings on Reservations?

Answer. The Advisory Opinion of the International Court of Justice on Reservations to the Convention on Genocide, [1951] I.C.J. 15, states that, in the absence of an express reservation clause in multilateral treaty, reservations are permissible unless they are contrary to the object and purpose of the treaty. The three understanding posed by the State Department would, of course, pose no such problem. However, if the United States were to ratify the Convention with the kind of reservations proposed by Professor Friedlander during his testimony before the Subcommittee, the International Court of Justice would likely find that such reservations were incompatible with the object and purpose of the Convention and, in effect, constituted a nullification of the United States ratification.

Question 18. What is the Significance of the ICJ's View of the Universal Application of the Convention?

Answer. In its Advisory Opinion on Reservations to the Convention on Genocide, [1951] I.C.J. 15, the International Court of Justice commented on "The clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention." The significance of this statement is that it supports the proposition, supported also by the Restatement of the Foreign Relations Law of the United States (American Law Institute, 1982) and eminent jurists, that it is a violation of customary international law if a state practices or encourages genocide or fails to make genocide a crime or to punish persons guilty of it. This means that the United States is already bound under customary international law by the substantive obligations contained in the Genocide Convention. However, ratification of the Genocide Convention would enable the United States to take more effective effort to combat and suppress the crime of genocide.

Question 19. Could an International Genocide Tribunal be Created by Executive Agreement?

Answer. The issue of the dividing line between those subjects that can be covered by an international agreement entered into by the President under his sole constitutional authority and those subjects that can only be covered by a treaty has been a subject of hot dispute. See, for example, Murphy, "Treaties and International Agreements Other Than Treaties: Constitutional Allocation of Power and Responsibility Among the President, the House of Representatives and the Senate," *Kansas Law Review*, vol. 23, pp. 221-48 (1975), reprinted in Appendix L. *Commission on the Organization of the Government for the Conduct of Foreign Policy*, vol. 5 pp. 99-115 (1975). The London Charter, which established the Nuremberg Tribunal, was an executive agreement. However, regardless of whether it might be constitutionally permissible to establish an international genocide tribunal or an international penal tribunal by executive agreement, today the executive branch and Congress concur that such a tribunal should be established, if at all, only by a treaty.

I hope that these responses to the questions will prove helpful. If you have any questions regarding my answers, please feel free to call on me. Thank you for your consideration.

RESPONSES BY JOHN F. MURPHY TO WRITTEN QUESTIONS FROM SENATOR CHARLES E. GRASSLEY

Question No. 1. Could an individual be prosecuted for the crime of genocide under the Treaty, before an international tribunal, when his crime consisted of a single act against a single individual?

Answer. No.

Question No. 2. Does the absence of "political" group persecutions in the genocide definition, mean that designation of an individual or ethnic group as an "enemy of the state," and subsequent persecutions of that group, would escape international prosecution for the crime of genocide under the Treaty?

Answer. No.

Question No. 3. If this is true, could Hitler have designated Jews as enemies of the state, and then systematically pursued their "extermination," unfettered by any provision of the Genocide Convention, if it was then in effect?

Answer. No, see my answer to Question 2.

Question No. 4. Would the Raj of India, be permitted to execute all Sikhs as "enemies of the state" following the assassination of Indira Ghandi, rather than as an ethnic or religious group?

Answer. No.

Question No. 5. Was it the east-block, or communist nations, that objected to the inclusion of "political" persecution in the Convention, as has been alleged?

Answer. Yes.

Question No. 6. Why are the Convention's terms aimed at individuals, rather than governments, when it is difficult to imagine genocide being conducted against a whole segment of a population without the cooperation of the state?

Answer. Because the political climate at the time the Convention was being drafted—and the same would be true today—precluded the thrust of the Convention being directed at governments.

Question No. 7. Was it the Soviets that objected to the language "with the complicity of government" to the genocide definition?

Answer. Yes.

Question No. 8. Would ratification of the Treaty supercede all previous treaties and acts of Congress that are inconsistent with its terms, including bilateral extradition treaties with other nations?

Answer. As explained more fully in my testimony and in my letter, ratification of the Treaty would supercede any previous treaties or acts of Congress that would be in conflict with its terms. However, this is not a legitimate concern, because ratification of the Genocide Convention would be consistent with all current U.S. Treaties and Acts of Congress.

Question No. 9. Would any person charged with genocide be tried before an international tribunal, even if they are tried by their own nation for the same or an underlying act?

Answer. No.

Question No. 10. If this is true, would that not offend the Constitution's provisions against "double jeopardy?"

Answer. See my answer to Question 9.

Question No. 11. Would a person who commits murder of a person or group of persons because of a racial or religious hatred, in one of our states, be tried for genocide in a federal court rather than murder or mass murder in the state in which the violence occurred?

Answer. If an individual committed an act that constituted genocide under federal law, he could be tried for genocide in a federal court; at the same time, he might be tried for murder or mass murder in the state in which the violence occurred. Federal and state courts, in such instance, would have concurrent jurisdiction over such an individual.

Question No. 12. Would a person tried in United States courts for the act of genocide, be accorded the constitutional and legal protections that an accused defendant enjoys for other crimes under U.S. law?

Answer. Yes.

Question No. 13. Would a person accused of the crime of genocide before an international tribunal be accorded the protections an accused person has in the United States, even if he is a U.S. citizen and the crime or crimes occurred within U.S. jurisdiction?

Answer. No such international criminal tribunal has been established; the procedural protections a United States citizen or others might enjoy before such a tribunal would have to be established. However, the possible creation of an international criminal court in the future—which as explained more fully in my testimony and in my letter is an unlikely event—is simply irrelevant to the issue whether the Genocide Convention should be ratified by the United States.

Question No. 14. Would a congressionally passed statute expanding the rights of the accused, or an evidentiary ruling of a judge that expands those rights, in a prosecution of an individual in U.S. courts for the act of genocide, subject the legislators or judges to prosecution as well?

Answer. No.

Question No. 15. Would American military personnel, serving in time of war, be subject to punishment for the crime of genocide for acts that involve the taking of life of enemy troops, or the forced relocation of civilian populations in a "war zone?"

Answer. No.

Question No. 16. Would the Treaty be self-executing, or would legislation be needed to enforce the Genocide Convention as it applies to the United States?

Answer. The Treaty would not be self-executing and legislation would be required to enforce it in the United States.

Question No. 17. Would ratification subject any citizen of the United States accused of this crime to international jurisdiction, without the possibility of the United States to object to the jurisdiction of the tribunal?

Answer. No.

Question No. 18. Would the state of Israel, or any of its officials and citizens be subject to international prosecution under the Genocide Convention, upon the complaint of Yassir Arafat or the P.L.O., that its West Bank settlement policies constitute genocide against the Palestinian people?

Answer. No.

Question No. 19. If so, would Prime Minister Peres, or other Israeli officials be subject to arrest while visiting the United States, and subsequent extradition, upon the complaint of the P.L.O.?

Answer. See my answer to Question 18.

Question No. 20. Could the actions of this government to reduce budgetary deficits by reducing entitlement or other social welfare programs that tend to disproportionately benefit ethnic or religious groups, constitute genocide?

Answer. No.

Question No. 21. Given that the Nuremberg Declarations found that the promotion of abortions among minority populations amounted to genocide, could not the location of abortion facilities in neighborhoods that are primarily made up of one race, constitute genocide?

Answer. No. The Nazi practices regarding abortions among minority populations, condemned at Nuremberg, are in no way similar to abortion facilities in U.S. neighborhoods.

Question No. 22. Do you believe that had this Treaty been in effect, and Germany a party to it in the 1930's, that Hitler would have been prevented from pursuing the elimination of the Jewish people, and the others that were persecuted?

Answer. Hitler violated a large number of international treaties during the 1930's. The problem was not the absence of international law, but the Western democracies' lack of will to stop Hitler at a time when he could have been stopped with a minimum of violence.

Question No. 23. Do you believe that Stalin would have been prevented from fostering the mass-starvation and executions of the Ukraine?

Answer. No, but the presence of a Genocide Convention—assuming the Soviet Union was a party to it—could have been used as one basis for focusing attention on Stalin's heinous crimes.

Question No. 24. Do you believe that the mass executions of the Cultural Revolution in the People's Republic of China could have been prevented by this Treaty?

Answer. The answer to this question is basically the same as my answer to Question 23.

Question No. 25. Why were not the mass executions of Kampuchea stopped by the Genocide Convention?

Answer. The Genocide Convention does not operate without states parties taking action. The problem did not lie in the terms of the Genocide Convention; rather the international community has simply lacked the will to stop the mass executions in Kampuchea.

Question No. 26. Why is the persecution of the Mesquito Indians in Nicaragua not the subject of a genocide prosecution right now?

Answer. No one has brought an action against Nicaragua to call it to account for its treatment of the Mesquito Indians. As pointed out on several occasions during the hearings, if the United States were a party to the Genocide Convention—without a disabling reservation to Article IX regarding the jurisdiction of the International Court of Justice—it would be in a position to bring such a claim against Nicaragua.

Question No. 27. Does the advocacy of religious or racial hatred, constitute an act of Genocide under the Treaty's "incitement" provision, and thereby violate the First Amendment's protection of "free speech" regardless of how offensive the speaker is?

Answer. No. This was pointed out on numerous occasions during the hearings, and it is also discussed in my letter of March 18, 1985.

Question No. 28. Does the Treaty permit the United States or other international tribunal, to cite the United States or any individual or government official, for genocide, by failing to act to pass legislation implementing the Treaty?

Answer. No. Of course, if the United Nations were to fail to pass legislation implementing the Treaty, it would have failed to carry out its obligations under the Treaty, but it would not by that failure have committed genocide. In any event, this cannot possibly pose any problem because it is agreed by all that the United States will not ratify the Genocide Convention until Congress has passed and the President has signed the necessary implementing legislation.

Question No. 29. What would constitute "causing mental harm" under the provisions of the Treaty?

Answer. As pointed out on several occasions during the hearings and on numerous other occasions, "causing mental harm" means "permanent impairment of mental faculties"—the kind of harm caused by the Nazis with their drug experiments on Jews during world War II.

Question No. 30. Would the failure of the United States to act to restrain the persecution of a people in another country, subject the President or the Secretary of State to prosecution for an act of genocide before an international tribunal?

Answer. No.

Senator HATCH. Thank you.

We will now turn to Dr. Friedlander, who is currently professor of law, Pettit College of Law, Ohio Northern University. He holds a B.A., 1955; M.A., 1957; and Ph.D. 1963, from Northwestern University, where he took all three degrees in the field of history. He received his juris doctorate degree from the De Paul University College of Law in Chicago, IL, where he specialized in criminal law, constitutional criminal procedure, and international law.

Dr. Friedlander is the author and editor of seven books and has authored over 80 articles. We are happy to have you with us.

**STATEMENT OF ROBERT A. FRIEDLANDER, PROFESSOR OF LAW,
PETTIT COLLEGE OF LAW, OHIO NORTHERN UNIVERSITY**

Mr. FRIEDLANDER. Thank you, Mr. Chairman. It is a privilege to be here with you. I have submitted for the record a prepared statement and Convention analysis. Therefore I will confine my summary remarks to the six questions we were supposed to discuss today.

By way of introduction, I submit that the Genocide Convention is wrong in its focus, confused in its substance, and unpredictable as to future application. Individuals cannot and do not commit genocide. Only states or governments can perpetuate that barbaric activity when that activity is properly defined. The designation of genocide found in the Convention is vague and overbroad, arbitrary and capricious, and unreasonable in construction and composition. Genocide, as defined by the Convention, can apply to just about anyone, doing almost any act, posing almost any threat to virtually any type of victim. Article II provides the possibility that a single victim may suffice for a charge of genocide.

I will now attempt to answer, in short scope, each of the pertinent questions raised by you, Mr. Chairman, in your opening statement.

Should the treaty-making power be used as the basis for the enactment of domestic legislation in the United States?

Definitely not. The framers of the American Constitution intended the supremacy clause, as it relates to the treaty-making power, to apply only in the context of foreign affairs and not as an alternative means of domestic legislation. The writings of commentators and publicists have sometimes created interpretations that do not exist and have expounded theories which cannot be derived from the language of the cases themselves. The use of dicta to bolster

further dicta, disguised as rules of law, is not new to constitutional jurisprudence, but nowhere is it more apparent than in case law relating to the treaty-making power and the supremacy clause of article VI. The barriers to the operation of the 10th amendment with respect to article VI have been built by dicta and shaped by implication, but they have not yet consigned that particular portion of the Bill of Rights to permanent oblivion. To quote Justice Hugo Black: "If the judges, in deciding whether laws are constitutional, are to be left only to the admonition of their own conscience, why was it that the Founders gave us a written Constitution at all?"

Would the Genocide Convention alter the balance of authority between the States and the Federal Government by making genocide an international and Federal crime?

Yes, it would. The balance between Federal and State criminal law as it now exists, in the form of dual sovereignty, would be severely dislocated, and the traditional principle of concurrent jurisdiction would be seriously disrupted. The seeds of this approach can already be found in Judge Irving Kaufman's controversial opinion in the *Figlartia v. Pena-Irala* case of 1980. Kaufman's opinion has become a rallying point for those who would make the Universal Declaration of Human Rights, the Genocide Convention the two international covenants and the convention on the elimination of all forms of racial discrimination self-executing in American law. *Figlartia* creatively asserts that U.S. law is subject not only to the U.N. charter, but also to all relevant human rights instruments, including—of course—the Genocide Convention. At best, the Genocide Convention would exacerbate State-Federal jurisdictional conflict. At worst, it would definitely subordinate State criminal codes to Federal criminal law via articles II and III of the Convention.

Does the Convention violate specific amendments to the constitution?

Indeed. The Convention, in its present form, violates the first, fifth, and sixth amendments with respect to freedom of the press and of speech, due process, protection from self-incrimination, the right to confront one's accusers, the right to a public trial, the right to a trial by jury, and the right to an attorney, among others.

Article VI provides for the establishment of an international criminal tribunal on genocide with no presumption of innocence, reasonable doubt standard, or even a concern for fundamental fairness.

Does ratification of the Convention limit our national sovereignty?

Yes. The United States, by virtue of article VII, is forced to amend its historic position on political criminality, as contained in every U.S. bilateral extradition treaty. The United States may also be compelled by the Genocide Convention to subject visiting diplomats or dignitaries—for example, officials of Israel and Great Britain—to arrest and extradition for alleged crimes of genocide as claimed by other states parties and their political partisans. The International Court of Justice has already twice declared that the principles of the Genocide Convention are binding on all states, whether they have ratified the Convention or not. It should also be emphasized that the reservations made by the U.S. Government to

the International Court of Justice protocol at the time of accession in August 1946, including the Connally amendment, do not apply to article IX, under which one state can compel another to accept International Court of Justice jurisdiction. Both the State and Justice Departments have conceded that the 1946 reservations do not apply to the Genocide Convention.

Does the Convention mandate changes in the independence of the American legal system?

Without a doubt. The Congress, the executive branch, and the courts, including the Supreme Court, are not judgment proof and have no immunity under the wording of article IV. They all are subject to prosecution and punishment for acts and decisions made within the scope of their authority. Under article VIII punitive measures could be imposed against U.S. officials and American citizens by the U.N. General Assembly, where the United States has no veto and has been continually outvoted on most issues.

What amendments, reservations, declarations, or understandings should be attached to the Genocide Convention?

I strongly believe, for reasons already given, that the Genocide Convention does not merit Senate approval. If, however, ratification is inevitable, subject to certain limitations, then I do suggest a number of reservations. I say reservations, Mr. Chairman, rather than amendment, declaration, or understanding, because any amendment would require renegotiation of the Convention, while declarations and understandings have no legal consequences.

My own suggestions regarding reservations are as follows:

First, a reservation to article I in that the crimes of genocide as specified in the Convention do not apply to regular or irregular military conflicts as they are defined in customary international law.

Second, a reservation to articles II and III that the so-called criminality described therein must specifically relate to elements of Federal crimes proscribed by the U.S. Code.

Third, a reservation to articles IV, V, and VI that procedural safeguards contained in constitutional Bill of Rights guarantees, plus the presumption of innocence, are required in any U.S. trial and by any international genocide court as established by treaty or convention.

Fourth, a reservation to article IV specifically exempting judges from civil and criminal liability under the Convention when they are acting in their official capacity and within the scope of their judicial authority.

Fifth, a reservation to article VI that the establishment of any international penal tribunal requires a separate, non-self-executing treaty or convention.

Sixth, a reservation to article VII stipulating that extradition is not applicable when the acts described in article III represent political opposition to an incumbent regime.

Seventh, a reservation to article IX that the Connally amendment specifically applies to any matter involving the United States brought before the International Court of Justice at the request of another state party under the provisions of the Genocide Convention.

Eighth, a general reservation specifying that, for the United States, the Genocide Convention is not self-executing, either in whole or in part, and that each relevant article will require domestic legislation for the purpose of implementation.

I would like to stress—again—that the three understandings and one declaration submitted by the Department of State and the Justice Department have admitted this in prior testimony before the Foreign Relations Committee. These so-called understandings and declaration were added as a method of easing the Senate's concern about potential adverse effects, though they have no legal effect themselves. Moreover, they make little, if any, sense and do not resolve any of the real problems posed by the language of the Convention.

In conclusion, Mr. Chairman, I am convinced that the Genocide Convention is ill-conceived, badly drawn, and potentially harmful to the operation of law under the American Constitution. The Genocide Convention has not brought anyone to justice. It has not succeeded in any of its objectives. If approved, the U.S. Government, U.S. officials, and American citizens will be prime targets for litigious adversaries seeking to embarrass this Nation. Domestic genocide litigation could well disrupt our already overloaded court system. This is too high a price to pay for a stillborn idea whose time has come, and—unfortunately—gone. A convention outlawing state terrorism in its historic and classic meaning, which would contain enforceable punitive measures, makes much more sense, and would make a far safer world, than the instrument which you are now considering. I urge rejection.

Thank you, Mr. Chairman, for the opportunity to present my views on this vital question.

[The prepared statement of Mr. Friedlander and responses to written questions follow:]

PREPARED STATEMENT OF ROBERT A. FRIEDLANDER

INTRODUCTION: THE NATURE OF THE PROBLEM

It has been more than thirty-six years since the United Nations General Assembly passed the Convention on the Prevention and Punishment of Genocide without dissenting vote.¹ It has been almost thirty-five years since the Genocide Convention was first submitted by the executive branch to the Senate Foreign Relations Committee, and nearly fifteen years since its resubmission during the divisive Vietnam war. In both those instances, plus three other considerations from 1971 to the present,² despite the fact that the Senate failed to give its consent to this still controversial instrument, the world community has not collapsed and the American Republic continues to be the staunch leader of the freedom-loving nations of the world. No public outcry in support of the Convention has reverberated throughout congressional corridors, and no fatal injury to the international protection of human rights has been sustained because of the U.S. abstention.

To the contrary, if genocide is defined as mass murder of either a particular nationality or of an identifiable group, then that supposed internationally proscribed criminal behavior has become embarrassingly prevalent in the Post-World War II decades.³ Instead of arguing, as have a number of American scholars, that the proscription of genocidal acts constitutes a universal norm,⁴ the truth of the matter is that the practice of genocide, as distinct from the prohibition, in point of fact has been so widespread that it sadly reflects modern global normative conduct. On the other hand, if genocide is truly an international crime with individual liability for such heinous activity,⁵ then why--except for Adolf Eichmann--has no individual, let alone government, been brought to bar since the Convention was first approved by the U.N. General Assembly in December, 1948?⁶

The first fundamental (and arguably fatal) flaw of the Genocide Convention is the question of focus, or to place it in broader

perspective, the question of definition. In terms derived from our own legal system, the definitions proffered by Articles II⁷ and III⁸ of the Convention are vague and overbroad, arbitrary and capricious, and statutably unreasonable both in their construction and application. They are in American constitutional phraseology violative of substantive due process and could not withstand strict constitutional scrutiny by United States federal courts, since criminal statutes in this country have to be strictly construed in favor of the defendant.⁹

In its 1951 Advisory Opinion on the reservations to the Genocide Convention, the International Court of Justice (ICJ) claimed that "[t]he high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."¹⁰ But this is not how American law operates, how the common law applies, nor is it how international law is supposed to work. High ideals and nobility of purpose are no substitute for the precision and specificity of statute required either by the adversarial or the inquisitorial criminal justice systems. The description of the "crime" of genocide provided by the Genocide Convention is so expansive and all-inclusive as to cover almost any wrongdoer, perpetrating almost any criminal act of violence, or advocacy of violence, against almost every type of victim.

The various classifications of subject victim groups put forward by Article II (national, ethnical, racial, or religious as such), encompasses virtually all conceivable persons, except for those having a particular political affiliation, which the drafting committee voted to discard over the objections of the U.S. delegates, but with the support of the Soviet Union.¹¹ Actually, in retrospect that was probably just as well, since the inclusion of a political groups category would have opened the way to every small, dissident, radical political faction to raise a charge of genocide every time it was prevented from achieving its immediate objectives or was denied major party recognition. Moreover, the crimes enumerated in Article II present some very serious additional problems.

No American citizen or resident alien (legal or otherwise) seems to be excluded from the sweep of this Article.¹² As for the enumerated crimes, (a) "Killing members of the group" does not allow for any defenses; (b) "Causing serious bodily or mental harm to members of the group" does not specify the degree of mental harm nor distinguish whether the injury includes psychological disorientation of a temporary nature; (c) "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" can lead to charges raised by minority groups suffering from residential discrimination or ghetto life, or by native Americans seeking redress for the type of existence found on Indian reservations; (d) "Imposing measures intended to prevent births within the group" can lead to complaints directed against government agencies promoting contraceptives or against government officials (including the U.S. Supreme Court) for allowing the practice of abortion (the pro-life terrorists could end their bombing, and could concentrate instead upon paralyzing the federal courts with a flood of genocide actions); (e) "Forcibly transferring children of the group to another group" may involve the placing of minority dependent children in foster homes. The list of possibilities for creative lawyers is practically endless.

Of even greater import, failure to specify a requisite size for a potential victim group in Article I raises the possibility that a single victim belonging to the above-listed groups may be sufficient for a genocide accusation. Despite denials of the State Department to the contrary,¹³ the Special Rapporteur of the United Nations Economic and Social Council Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in his study of the prevention and punishment of genocide, admits it was generally agreed in the debates of the Sixth (Legal) Committee during the drafting of the Convention that "it was not necessary for the act to be aimed at a group in its entirety." He goes on to add: "[a] number of writers also believe that the Convention should be interpreted as applying to cases of 'individual genocide'."¹⁴ That was also the view of the U.S. representative on the Sixth Committee.¹⁵ Thus, the distinction

between genocide and homicide becomes one of motive, the latter only applicable in American law to establish a case of first degree murder.

By the language of Article III, not only is genocide--as defined in Article II--a crime in international and (by incorporation under Article I) domestic law, but also proscribed are acts of conspiracy, incitement, attempt, and complicity relating to the crime of genocide. None of these punishable forms of conduct, as designated by Article III, contain any material elements whatsoever. There is no indication as to what method of legal analysis obtains for ascertaining the required criminal liability connected with the aforementioned activities. Are all these crimes equal in degree of culpability? Should they all be subject to same punishment? For that matter, what kind of punishment do they merit? On each of these significant questions, the Convention is silent.

The rock upon which the Convention foundered from its very inception is one of the nature of criminal responsibility. The lessons of history, politics, and reality clearly indicate that genocide is committed by governments, not by individuals. An individual, or even a small number of individuals, cannot wipe out an entire group, unless it is a very small group indeed. Neither the designations of genocide provided by the Convention, nor the definition offered by its forerunner, U.N. General Assembly Resolution 96 (I) of December 11, 1946,¹⁶ indicate that genocide in its historic sense is a matter of state responsibility. A distinguished American political sociologist in a recent analysis has provided the following definition:

Genocide is herein defined as a structural and systematic destruction of innocent people by a state bureaucratic apparatus.... Genocide means the physical dismemberment and liquidation of people on large scales; an attempt by those who rule to achieve the total elimination of a subject people.¹⁷

In other words, genocide is mass murder perpetrated by a repressive government. To say, as does Article IV, that private individuals commit genocide is not only pure hyperbole, but in the context of the so-called criminality of Article II, it is a loaded weapon pointed at the citizenry of any signatory state.¹⁸

THE TREATY-MAKING POWER: CONSTITUTIONAL
MYTHS AND LEGAL REALITIES

The second paragraph found in Article VI of the U.S. Constitution contains the important supremacy clause which reads as follows: "This Constitution and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of the State to the Contrary notwithstanding." These hallowed words, full of subtle inferences and studied ambiguity, have led some courts and many lawyers and legislators to make extravagant assertions as to their meaning, beyond existing statutory law and legal precedent. For example, a distinguished Editor-in-Chief of the American Journal of International Law, George Finch;¹⁹ John Foster Dulles, prior to becoming Secretary of State;²⁰ A.B.A. Representative and noted international lawyer, Eberhard Deutsch;²¹ and U.S. Representative, Chet Holifield, of California,²² all subscribe to the view--along with numerous other qualified commentators--that treaties stand above U.S. law and can override U.S. law.

Dulles claimed shortly before becoming Secretary of State that "[t]reaties make international law and also they make domestic law."²³ Finch complained of "the exercise of the treaty-making power as a method of amending the Constitution."²⁴ Representative Holifield claimed: "a treaty is above domestic law, that it overrides domestic law. ...[A] treaty is superior over domestic law."²⁵ Those statements, and others like them made in sincere good faith, are only partially true, but the currents and eddies of American constitutional law continue to swirl and to reshape our thinking in a manner that makes possible a transformation in contemporary legal interpretation.

From the notes taken of the debates at the Constitutional Convention by James Madison and Dr. James McHenry, it is clearly apparent that treaties were intended to take precedence over the laws of the respective states.²⁶ In fact, Gouverneur Morris in his motion eliminating the words "enforce treaties," unani-

nously accepted, declared that treaties were to be "laws."²⁷ Francis Corbin, a strong supporter of the Constitution in the Virginia Ratification Convention of 1788, was somewhat more specific: "It is as clear that two and two make four, that the treaties made are to be binding on the states only."²⁸ The intent of the framers is best reflected in the Federalist Papers, which remain to this day the most informed commentary on the meaning and purposes of the U.S. Constitution. John Jay, writing in Federalist No. 64, maintained that "[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature:....[treaties] are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period...."²⁹ (It should not be forgotten that Jay became the nation's first Chief Justice.) Alexander Hamilton added, in Federalist No. 69, that the sovereign authority of the federal executive exceeds that of the state executive in one significant area--that of the treaty power.³⁰

A careful reading of the Constitutional Convention debates, the Federalist essays, and various sessions of the special state conventions called to determine the outcome of ratification, shows that the supremacy clause with respect to treaties was not a major issue. Though there was some small concern over technical interpretation,³¹ there was no controversy over its wording. The first significant political figure to manifest serious concern about treaty implications was Thomas Jefferson. His Manual of Parliamentary Practice, published while he was Vice-President, posited the view that "surely the President cannot do by treaty what the whole government is interdicted from doing any way...."³² Although modern commentators have held this to be an extreme minority view (since it has been linked with the reserved powers language of the Tenth Amendment),³³ Jefferson may have had something else in mind. Namely, "those subjects which are usually regulated by treaty and cannot otherwise be regulated."³⁴

The better interpretation, and one which has been curiously avoided by academic analysts, is that the framers understood the supremacy clause as it relates to the treaty-making power only in the context of foreign affairs and not as an alternative means of

domestic legislation. Hamilton, in Federalist No. 75, focusing on the treaty-making powers of the president, clearly indicates that treaties are the product of foreign relations and political negotiations between sovereigns. There is no mention of any domestic devolution.³⁵ Foreign affairs in the constitutional sense meant matters customarily in the hands of a sovereign executive. Another reason the conduct of foreign policy was assigned to the president was the fear of possible excesses on the part of the legislative branch (recalling the colonial experience under the British Parliament).³⁶ Since there was no intention on the part of the founding fathers to make treaty subject-matter analogous to domestic legislation, there was no manifest concern as to its possibility. This can be seen not only in Madison's brief comments during the drafting session in Philadelphia on August 23, 1787,³⁷ but also in the failure of the Anti-Federalists to oppose the supremacy clause in its treaty function.³⁸

Article III, Section 2, of the United States Constitution gives to the courts the power to decide cases or controversies resulting from disputes arising from treaties:

The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made under their authority....

Hamilton's essay in Federalist No. 80 indicates that treaties were meant to be adjudicated, if they were challenged.³⁹ The rules and precedents governing the treaty-making power have in fact been derived from litigation since the Jay Court of the Washington presidential era. Not that many general rules have actually been established. A number of them remain obscure to this day. The writings of commentators and publicists have sometimes created implications that do not exist and have expounded theories which cannot be derived from the language of the cases themselves. This explains, in large part, the confusion still prevalent over the treaty-making power and its relation to domestic legislation.

Many of the legal principles traditionally associated with the supremacy clause and the treaty power are drawn from generalized dicta. These claims have been periodically renewed every generation or two in sweeping and sometimes fuzzy language. Unlike the

Burger Court, where the dicta of one case becomes the rule in another, the jurisprudential history of the treaty power demonstrates that the dicta of one generation is revived or repeated in the dicta of succeeding generations. This curious historical development began just seven years after the establishment of the American constitutional republic with the much-cited case of Ware v. Hylton (1796),⁴⁰ which invalidated a Virginia statute as being contrary to the supremacy clause.

Admittedly, the difficulty of dicta is that lawyers and jurists rarely agree on what comprises mere personal opinion or what the distinguished legal scholar, Karl Llewellyn, called "wayside remarks." These may not only "shed light on the remarker", but they may also "be very useful in the future to him, or to us."⁴¹ The identification of dicta and its proper role is complicated, however, by the fact that "[w]hat one judge calls the 'true role employed in a decision, another judge may describe as 'dictum'".⁴²

Ware v. Hylton represents such a conundrum. In the first of five seriatim opinions delivered by a per curiam court, Chase, J., laid out the basic tenets of the treaty power as it relates to the several states. Article VI, declared Chase, J., transforms the treaty power into the supreme law of the land, state courts and state constitutions notwithstanding. No act of a state legislature can be allowed to conflict with a treaty and state legislation must give way to treaty provisions when a treaty has entered into force. As long as a treaty is made under the authority of the United States (i.e.-according to constitutional requirements), both state and federal courts are required to recognize treaty ascendancy.⁴³ Iredell, J., and Cushing, J., were in exact accord, with Iredell adding it was "indispensable" that treaties "be published for the information of all."⁴⁴

A major problem arises, however, with the statement of Justice Cushing at the end of his opinion (the last of the five), wherein he declared that the treaty in question was "of equal force with the constitution itself", and then went on to add: "and certainly with any law whatsoever."⁴⁵ This is dicta pure and simple which puts forward a claim not to be made again for another 140 years! Cushing, nevertheless, had company in developing a theory of soaring

expectancy. Justice Chase likewise exceeded the bounds of precedent, common law, and customary international law when he declared that the "modern law of nations" is obligatory not only on Virginia's courts and citizenry, but also "in my opinion, on all the Courts of the United States."⁴⁶ This sweeping assertion, again pure dicta, was not to be heard again in the federal courts for a century and three-quarters, until Judge Kaufman's U.S. Court of Appeals decision in Filartiga v. Pena Irala, where he made mention of "numerous decisions in applying rules of international law uncodified in any act of Congress."⁴⁷ (Kaufman actually mentioned only three, the only case on point being none other than Ware v. Hylton.) Thus, a different kind of precedent had been established--one which would plague the courts and the constitutional system right down until the present day.

The use of dicta to bolster further dicta, disguised as rules of law, is not new to constitutional jurisprudence, but nowhere is it more apparent than in case law relating to the treaty-making power and the supremacy clause of Article VI. The assumptions and the intentions of the framers have been gradually eroded over nearly two hundred years by judicial predilection, but not by the appropriate application of stare decisis. In light of future events, it is also fascinating to note the plaintiff's advocate, John Marshall at oral argument in Ware v. Hylton, challenged the idea that the Senate could approve a treaty which would then operate to annul a state's legislative act.⁴⁸ More than a third of a century later, as Chief Justice of the United States, he would adopt a different view.

Nowhere in the aforementioned opinions was there any reference to the Tenth Amendment. The same obtains for the landmark decision of Foster v. Neilson (1829).⁴⁹ Chief Justice John Marshall, at the apex of his historic leadership of the nation's highest court, chose a dispute over land granted by the Spanish crown to articulate a vast extension of the treaty power concept. Marshall's goal pure and simple was to nationalize American constitutional law. His instrument to achieve those ends, in the words of the distinguished Princeton scholar, Edward S. Corwin, was "the obiter dictum--

by whose broad strokes was hewn the highroad of a national destiny."⁵⁰ In the Foster case the Chief Justice succeeded in transforming a personal theory into a legal presumption that had consequences far beyond Marshall's original expectations.

Foster v. Neilson introduced the principle of self-executing treaties without reference to any case and without reference to particular Anglo-American state practice. A treaty is a contract, Marshall declared, and not a legislative act. But the United States Constitution, he added, by means of the supremacy clause, makes a treaty "regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."⁵¹ From this slim sentence of personal observation, American treaty practice was transformed. The new principle was based on nothing more than Marshall's own personal belief, rather than a standard within the contemplation of the framers.

A half-century later, the majority opinion in Hauenstein v. Lynham (1879) quoted verbatim the passage on the domestic application of treaties by Justice Chase in Ware v. Hylton (1796). But then, the Hauenstein decision added, the court does not concur in everything Chase wrote in the cited extract, but only makes reference to the fact that "it shows the views of a powerful legal mind at that early period, when the debates in the convention which framed the Constitution must have been fresh in the memory of the leading jurists of the country."⁵² In other words, the Ware case is useful for general interpretation and nothing more. Yet, a leading American treatise on constitutional law strongly implies that Ware represents a strict limitation on the tenth amendment,⁵³ whereas Hauenstein never even mentioned the tenth amendment! Nor, with respect to the operation of the treaty power, did it mention any case but that of Ware--and the latter was subject to unspecified qualifications by the Hauenstein court.

Thus, in little less than a century, the U.S. Supreme Court had established a pattern of constitutional analysis with reference to the treaty power and Article VI that was to continue down until the present day. Concern over what the Court was doing and how the Court was doing it, however, was manifest as

early as The Chinese Exclusion Case (1888), wherein the historic common law principle of leges posteriores priores contrarias abrogant (later laws abrogate prior contradictory ones) was enunciated. Repeating (without citation) the Marshall dictum that treaties were actually contracts, and that treaties may be self-executing, the Chae Chan Ping court then went on to add, in dicta of its own:

If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will control.⁵⁴

This remains the law today,⁵⁵ along with the proposition that courts will always attempt to construe treaties and federal statutes "so as to give effect to both, if that can be one without violating the language of either...."⁵⁶ If this cannot be satisfactorily resolved, then the last in time will take precedence.

The first indication in Supreme Court jurisprudence that the substantive content of treaties may have a major domestic emphasis with respect to municipal law can be found in Geofroy v. Riggs (1889). For one hundred years following the ratification of the Constitution by the specially assembled state conventions, it was assumed that the subject matter of treaties dealt primarily, if not exclusively, with foreign affairs. In the words of Geofroy, "[t]hat the treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations, is clear."⁵⁷ But given the dicta of the prior one hundred years with respect to the nature of the treaty power, and with the United States increasingly involved in contact with other nations in one sort of formal relationship or another, treaties were likely to have domestic effects and even to contain language relating to domestic matters. A potential constitutional conflict was not outside the realm of possibility.

To ensure that such situation would not occur, Justice Field, writing for an unanimous court, stressed unidentified constitutional restraints which can be applied against the treaty power. Treaty provisions, he declared in a famous phrase, cannot be extended "so far as to authorize what the Constitution forbids...."⁵⁸

Almost seven decades later, in Reid v. Covert (1957), the Supreme Court using its strongest language to date, though still arguably dicta, maintained that constitutional prohibitions have to be taken into account by international agreements. The majority was emphatic, if not altogether specific: "This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty." But there was only one authority cited--Geofroy v. Riggs.⁵⁹

Not until 1920, in the landmark decision of Missouri v. Holland were any more principles added to treaty theory. Oliver Wendell Holmes, Jr.'s, famous opinion has become, in truth, all things to all courts (and to all commentators). As one respected expert pointedly observes: "Justice Holmes' opinion was cryptic. It is rather difficult to find out exactly what his analysis was meant to convey except that it was obvious he had a great love for migratory birds."⁶⁰ Legal treatises have traditionally, erroneously, cited Missouri v. Holland as standing for the proposition that there are no substantive limits upon the treaty-making power, that treaties are an independent source of congressional authority, and that a tenth amendment limitation upon the federal treaty power does not exist.⁶¹ But there are also reputable critics who are not so sure. One relatively recent study of federal and state constitutional powers accuses Holmes of indulging in a "superficial analysis" and goes on to attack his "unsound and unsupportable" rationale, particularly with reference to the limited operation of the tenth amendment.⁶²

The claim that "[a]ny tenth amendment limitation on the federal treaty power was flatly rejected in the landmark case of Missouri v. Holland",⁶³ is repeated by most treatise writers, but it is an incorrect analysis at best. (The same authors also maintain that Justice Field excluded tenth amendment restrictions in Geofroy v. Riggs, but his opinion never even mentioned the tenth amendment.)⁶⁴ As Professor Williams has noted, Holmes' opinion in Missouri v. Holland requires close scrutiny.⁶⁵ On the one hand, Holmes seemed to indicate "that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers re-

served to the States, a treaty cannot do." But undercutting his own argument, he then went on to add that the real question in such matters is whether a treaty "is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved."⁶⁶

However incomprehensible the latter statement is at first glance, the U.S. Supreme Court a mere four years later, in the case of Asakura v. Seattle (1924), enlarged on Holmes' implied tenth amendment limitations (which were only suggested in a single sentence). "The treaty-making power of the United States is not limited by any express provision of the Constitution," the Court sweepingly asserted. It then went on to declare that the treaty power "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."⁶⁷ This is probably the most expansive claim made by the United States Supreme Court on the subject. Not without reasons have most courts and commentators shied away from citing it as controlling precedent.

The nadir of treaty interpretation and the height of obscurity of language can be found in United States v. Curtiss-Wright Export Corporation (1936), where it seems Justice Sutherland sought to discard the idea of constitutional power and substitute the notion of national inevitability. According to Sutherland, "[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with over sovereignities, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." This was a power which was not drawn from the Constitution, but was a part of the sovereign manifestation of the United States.⁶⁸ Despite its approval by proponents of expansive federalism,⁶⁹ the Curtiss-Wright decision illustrates the dangers to the balance of power between the Federal Government and the several states, if the subject matter of all treaties were beyond the reach of the Constitution. Sutherland, of course,

did not go that far, and managed to admit that the "exclusive power of the President as the sole organ of the federal government in the field of international relations....like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."⁷⁰ Nonetheless, his assessment of presidential authority is a clear illustration of the juridical dangers of runaway dicta.

Curtiss-Wright also laid the foundation for the elevation of executive agreements to treaty status, which was to occur the following year in United States v. Belmont (1937), in another dicta excursion of Justice Sutherland (relying on Curtiss-Wright),⁷¹ and by United States v. Pink (1942), in an opinion written by Chief Justice Stone. All international compacts, Stone declared, had to be treated with "similar dignity". That meant state law had to yield not only to a treaty, but also to an executive agreement, or otherwise "our foreign policy might be thwarted." Relying on Sutherland's argument in Belmont, Stone went on to assert that "the policies of the States become wholly irrelevant to judicial inquiry, when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts."⁷³ This represents the high watermark of judicial approbation of the presidential exercise of sovereign authority with respect to Article VI. Fifteen years later, Reid v. Covert (1957) placed both treaties and executive agreements within the ambit of the Bill of Rights. However, the majority opinion in an obscure reference back to Missouri v. Holland, also denounced the tenth amendment as a possible limitation on the treaty power by proclaiming: "the Tenth Amendment is no barrier."⁷⁴

Have 190 years of dicta become truly persuasive in treaty jurisprudence, or is there still an opportunity to reverse what jurists, commentators, and the executive branch have assumed to be the tide of history? In the Reid decision, Justice Frankfurter's concurrence reminded the court that "[t]he Constitution is an organic scheme of government to be dealt with as an entirety. A particular provision cannot be dissevered from the rest of the Constitution."⁷⁵ The barriers to the operation of the tenth amendment with respect to Article VI have been built by dicta and by

implication. They have not consigned that particular portion of the Bill of Rights to permanent obscurity.

Attorney Carl Riggs, who made several appearances before the Senate Foreign Relations Committee on behalf of the American Bar Association, testifying against the Genocide Convention from 1950 to 1970, plaintively wrote a friend on the Harvard Law School faculty, after the first round of Senate hearings, that the tenth amendment would soon become "dead as a dodo".⁷⁶ The U.S. State Department in a September 1950 publication, entitled Our Foreign Policy, claimed there was "no longer any real distinction between 'domestic' and 'foreign' affairs."⁷⁷ Neither view was true then, nor are they correct now. The Constitution is not only what the Supreme Court says it is, but also what the authors of the Constitution, and their immediate successors, have said it was.

Legal doctrines are not 'self-generated' abstract categories. They do not fall from the sky; nor are they pulled out of it. They have a special juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots.⁷⁸

Article III, Section 2, of the United States Constitution provides for treaties to be litigated by the federal judiciary. Article I, Section 8, Clause 10, provides for the Congress to pass legislation dealing with offenses against the law of nations. Clause 18--the Necessary and Proper Clause--grants Congress the authority to deal with all governmental problems, foreign and domestic. These passages clearly reflected the intentions of the framers. And substitution of substantive provisions of treaties and executive agreements for domestic legislation, or utilizing international instruments to override municipal statutes wholly domestic in content, were not within the contemplation of the founding fathers. To paraphrase Justice Holmes, 190 years of dicta are enough. It is time that the courts and the Congress redressed the constitutional balance. The Genocide Convention will further exacerbate the growing strains in the American political system.

CONCLUSION: TREATIES, EXECUTIVE AGREEMENTS, AND INTERNATIONAL LAW:
PRESENT COMPLEXITIES AND FUTURE CONCERNS

No court has ever declared a treaty unconstitutional, though

a number of landmark decisions (ie.-Reid v. Covert) indicate that the judicial branch has the power to do so. Treaties and conventions, like statutes, are to be construed reasonably and their words are to be interpreted in their ordinary meaning. When a treaty lends itself to a dual interpretation, the broader view of the rights of the parties is to be preferred.⁷⁹ Although there seems to be no precise pronouncement on the subject, since there is a strong presumption of constitutionality with respect to acts of Congress, it is reasonable to assume in the light of historical experience that the same applies to treaties.⁸⁰

The role of international law in domestic U.S. litigation has always been a matter of some controversy. Thomas Jefferson warned from Paris, during late December 1787, that international law should not become the basis for trials in the United States.⁸¹ In contrast, the most sweeping claim imaginable for the role of international law in U.S. municipal jurisprudence was put forward by Justice Chase at the time of the Jay Court, in the landmark case, Ware v. Hylton (1796). Chase's notion that international law imposed obligations on all courts, state and federal, and upon all citizens, was not only pure dicta,⁸² but was also ill-founded. The succeeding Marshall Court rejected this approach, emphasizing instead the importance of federal statute. After more than a decade on the nation's highest bench, Marshall conceded in Thirty Hogsheads of Sugar v. Boyle (1815) that the law of nations is in part unwritten, and in part conventional

[Its] principles will be differently understood by different nations under different circumstances The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect.⁸³

Two piracy cases, a little more than midway during Marshall's long tenure on the Court, highlight the careful analysis by Marshall and Justice Story of the connective links between international law and international criminality. In United States v. Palmer (1818), the U.S. government maintained that without a prior statute, there could be no definition and punishment of so-called international crime. The law of nations merely created the offense. Its prosecution and punishment depends upon the exercise of domestic jurisdiction under appropriate legislation.⁸⁴ Marshall apparently agreed,

going on to point out the fundamental importance of specificity and precision of language in drafting statutory crimes.⁸⁵ In United States v. Smith (1820), Justice Story reaffirmed the Marshall analysis. Offenses against customary international law, Story observed, "cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. In respect, therefore, . . . as to offenses against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish"⁸⁶ Thus, "[t]o define piracy;" in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy;" and to include their elements.⁸⁷ The bottom line for piracy and for all other international crimes falling within U.S. domestic jurisdiction is that the law of nations cannot of itself "form a rule of action".⁸⁸ This is still the law today with respect to any act internationally proscribed by custom, treaty, or convention.

It is the common wisdom among legal scholars that the Paquete Habana case (1900), in its description of the role of international law, has made the law of nations part of American legal doctrine: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."⁸⁸ One well-respected contemporary commentator interprets this to mean that international law is in fact "part of 'the law of the land.'"⁸⁹ Another prestigious analyst goes even further, flatly stating that customary international law "is directly incorporable" into the American legal process.⁹⁰ Small wonder that following the Nuremberg Judgment, and just prior to the U.N. approval of the Genocide Convention, a distinguished American legalist would write that "[i]nternational law has imposed obligations on states to punish certain acts committed in their territory, punishment of which is primarily an interest of other states or of the community of nations"⁹¹ If this was true, then approving the Genocide Convention would be merely symbolic, since its provisions would already control.⁹²

The reality of the American system is best reflected in the sharp-edged dicta of a 1925 Connecticut federal district court: "International practice is law only in so far as we adopt it, and like all common or statute law it bends to the will of Congress."⁹³ But in 1980, using Ware v. Hylton, United States v. Smith, the Paquete Habana, and a single sentence in The Nereide (1815),⁹⁴ Judge Irving Kaufman of the Second Circuit Court of Appeals, taking a dramatic departure from existing practice, claimed that all U.S. courts are indeed bound by the prevailing rules of international law. Kaufman's opinion in Filartiga v. Pena-Irala (1980) has become a rallying point for those who would make the U.N. Charter (1945), the Universal Declaration of Human Rights (1948), the Genocide Convention (1948), the two International Covenants on Civil, Political, Social, Economic, and Cultural Rights (1966), and the Convention on the Elimination of All Forms of Racial Discrimination (1966) self-executing in American law.⁹⁵

Figlartia creatively asserts that U.S. law is subject not only to the U.N. Charter, but also to all relevant human rights instruments.⁹⁶ It adds the ringing statement that "[f]ederal jurisdiction over cases involving international law is clear."⁹⁶ What is not clear is whether Kaufman is also implying that the violation of human rights have a quasi-criminal status in American courts. A resounding denial is offered by two opinions in the three-judge per curiam decision of the D.C. federal appellate court in Tel-Oren v. Libyan Arab Republic (1984). Both Judge Bork and Judge Robb take strong exception to the language and holding of Figlartia. Bork not only claims that the Figlartia case, if generally followed, would make all U.S. treaties self-executing, but also bluntly declares that the complaints found in Tel-Oren and Figlartia "were beyond the framers' contemplation."⁹⁹ Robb is even more critical: "the case appears to me to be fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure."¹⁰⁰

In sum, the law is still not clear and convincing over the application of quasi-criminal proscriptions by way of treaty and convention. The nature of the instrument is often self-executing, while convention, or even by executive agreement, it may very well be that

treaties can consist of executory and self-executing provisions.¹⁰¹ It may also very well be that an analogy may be drawn by future courts between the theory of international torts and the theory of international criminal law, which will once again stretch the Constitution beyond the intention of the framers. A distinguished international lawyer and legal academic has cautioned that "it is more fitting for the political branches to state United States viewpoints on human rights internationally than for the courts to do so unnecessarily."¹⁰²

The Genocide Convention will have the effect, if it is ratified, of refashioning U.S. municipal law by utilizing what appears to be a valid legal instrument, but which is actually burdened by a misleading and misguided orientation, however noble its stated purpose. The key provisions of the Genocide Convention are domestic rather than international in their essential characteristics. The real consequences of its implementation could be far worse than the prevention sought. Approval by the United States Senate will create more problems than the Convention will lay to rest. To date, the Genocide Convention has resolved nothing in a world filled with oppressive mass-murdering regimes.¹⁰³ There is no reason to believe, in this regard, the future will be any different than the past.

FOOTNOTES

1. Adopted Dec. 9, 1948; 78 U.N.T.S. 277; Entered into force, Jan. 12, 1961, hereinafter cited as Genocide Convention.
2. For a short history of the five different hearings held on the Genocide Convention and their result, see International Convention on the Prevention and Punishment of the Crime of Genocide, S. EXC. REP. 98-50 (Comm. For. Rel.), 98th Cong., 2d Sess. (Sept. 1984), at 2-7, hereinafter cited as FOR. RELS. REPT. (1984).
3. Cf., L. KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY (1981); The Genocide and Humanicide Symposium, 8 OHIO N. U. L. REV. 299 (1981); U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, Vols. 1979-1983.

4. See, for example, Edwards, Contributions of the Genocide Convention to the Development of International Law, 8 OHIO V. U. L. REV. 300, 305-306 (1981); Whiteman, 'Jus Cogens' in International Law, with a Projected List, 7 GA. J. INT'L & COMP. L. 609, 625 (1977). This was also the position of the International Court of Justice. See, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. 15, 23, hereinafter cited as I.C.J. Advisory Opinion; The Barcelona Traction, Light, and Power Company, [1970] I.C.J. 3, 32.
5. Genocide Convention, Art. IV.
6. Attorney General of the Government of Israel v. Adolf Eichmann, 36 I.L.R. 5, 30-42 (1968), hereinafter cited as Eichmann Judgment. Eichmann was convicted of crimes committed during the Jewish Holocaust of the Second World War, which antedated the Genocide Convention of 1948.
7. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.
8. The following acts shall be punishable:
 - (a) Genocide;
 - (b) Conspiracy to commit genocide;
 - (c) Direct and public incitement to commit genocide;
 - (d) Attempt to commit genocide;
 - (e) Complicity in genocide.
9. See W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 72-74 (1972).
10. I.C.J. Advisory Opinion, see supra note 4.

11. See Schweppe, Serious Problems Raised by the Genocide Convention, testimony before the Senate Foreign Relations Committee, in Hearings on the Genocide Convention before a Subcomm. of the Senate Comm. on Foreign Relations, U.S. Senate, 81st Cong., 2d Sess. (1950), at 73, hereinafter cited as Senate Hearings (1950); KUPER, supra note 3, at 24-30.
12. The originator of the concept of genocide, Professor Raphael Lemkin, was, if possible, even more inclusive, specifying the following categories: political, economic, social, cultural, physical, biological, moral, and religious. This, in effect, covered all humankind. See id., at 30; Lemkin, Genocide as a Crime under International Law, 41 AM. J. INT'L L. 145, 147-148fn., 151fn. (1947).
13. Le Blanc, The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding, 78 AM. J. INT'L L. 369, 373 (1984).
14. Ruhashyankiko, STUDY OF THE QUESTION OF THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, U.N. ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, U.N. Doc. E/CH.4/Sub. 2/416, 31st Sess. (July 1978), at 14, hereinafter cited as U.N. GENOCIDE STUDY.
15. 11 DIGEST OF INTERNATIONAL LAW 854 (M. Whiteman ed. 1968). His statement indicates that genocide and homicide can be concurrent crimes, later denied by Deputy Undersecretary of State Dean Rusk at the 1950 Senate Foreign Relations Committee Hearings. See FOR. RELS. REPT. (1984), supra note 1, at 9.
16. "Genocide is a denial of the rights of existence of entire human groups, as homicide is the denial of the right to live of individual human beings, such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.
Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.
The punishment of the crime of genocide is a matter of international concern."
17. I. HOROWITZ, TAKING LIVES: GENOCIDE AND STATE POWER 17 and 85 (3rd ed. 1960), emphasis given by author. Cf., also RESTATIMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (Tentative Draft No. 3, Mar. 15, 1982).

18. Originally, the American delegation urged co-responsibility between the individual and the state. Deutsch, Treaties Should Not Be Used To Enact Domestic Legislation, in Hearings on the Genocide Convention before a Subcomm. of the Senate Comm. on Foreign Relations, U.S. Senate, 92d Cong., 1st Sess. (1971), at 30, hereinafter cited as Senate Hearings (1971). The U.N. ECOSOC Special Rapporteur takes the view that states bear only political responsibility and not criminal liability. U.N. GENOCIDE STUDY, supra note 14, at 38.
19. Finch, The Genocide Convention Is Being Misinterpreted, Senate Hearings (1950), supra note 11, at 215 and 217.
20. See statement cited by A.S. MILLER, PRESIDENTIAL POWER IN A NUTSHELL 145 (1977).
21. Deutsch, Senate Hearings (1971), supra note 18, at 29.
22. Testimony of Hon. Chet Holifield, Congress, the President, and the War Powers, Hearings before the Subcom. on National Security Policy and Scientific Development of the Comm. on Foreign Affairs, U.S. House of Representatives, 91st Cong., 2d Sess. (1970), at 181, hereinafter cited as War Powers Hearings (1970).
23. Quoted by MILLER, supra note 20, at 143.
24. Finch, supra note 19, at 215. See, also, id., at 217.
25. Holifield Testimony, War Powers Hearings (1970), supra note 22, at 181.
26. Cf., entries of June 15 and August 23, 1787, in Madison's Journal, plus entry of August 23, 1787, in McHenry's Notes, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 206-207, 603, 942-943 (C. Tansill ed. 1927), House Doc. No. 398, 69th Cong., 1st Sess., hereinafter cited as FORMATION OF THE UNION.
27. Id., at 603 (Madison).

28. Quoted by R. BERGER, CONGRESS V. THE SUPREME COURT 406 (1975).
29. THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, BEING A COLLECTION OF ESSAYS WRITTEN IN SUPPORT OF THE CONSTITUTION AGREED UPON SEPTEMBER 17, 1787, BY THE FEDERAL CONVENTION 420-421 (E.M. Earle ed. 1937).
30. Id., at 451-452. Hamilton also stressed the concurrent power of the President with respect to treaties as compared with the sole power of the English monarch.
31. BERGER, supra note 28, at 395 and 405 fn. He has overemphasized what at most was a rather minor concern.
32. Quoted in id., at 402.
33. See, for example, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, ANNOTATIONS OF THE CASES DECIDED BY THE SUPREME COURT TO JUNE 29, 1972, at 497 (L. Jayson & J. Killian et. al. eds. 1973), 92d Cong., 2d Sess., Doc. 92-82, hereinafter cited as CONSTITUTION: ANALYSIS; BERGER, supra note 28, at 402-406.
34. Quoted in id., at 404. In a letter to President George Washington in 1791, Secretary of State Jefferson also stressed Article VIII, Paragraph 2, Clause 2: "To regulate commerce with foreign nations," which he stressed as an external power. A DOCUMENTARY HISTORY OF THE UNITED STATES 46 (R. Beffner ed. 1952).
35. THE FEDERALIST, supra note 29, at 486-488.
36. Id., at 488-489. See, also, Friedlander, Judicial Supremacy: Some Bicentennial Reflections, 8 RUT.-CAN. L.J. 24, 28-29 (1976), which refers to the Federalist's authors' concern with unbridled legislative power.
37. FORMATION OF THE UNION, supra note 26, at 943.
38. J.I. MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 138-139. The opponents of the Constitution were highly critical, however, over the exclusion of the House of Representatives in the approval of treaties.

39. THE FEDERALIST, supra note 29, at 519-521.
40. 3 U.S. (3 Dall.) 199.
41. K. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 42 (1973).
42. J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 277 (1973).
43. 3 U.S. (3 Dall.) 199, 236-237.
44. Id., at 272 and 284. Publication ties in with the notice requirement attached to the due process clause of the Fifth Amendment.
45. Id., at 284. (Emphasis added).
46. Id., at 229. (Emphasis in original).
47. 630 F. 2d 876, 886 (2d Cir. 1980). See also infra.
48. 3 U.S. (3 Dall.) 199, 235.
49. 27 U.S. (2 Pet.) 253.
50. E. CORWIN, JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT 123 (1921). He also refers to Marshall's "audacious use of the obiter dictum." Id., at 130.
51. 27 U.S. (2 Pet.) 253, 313-314.
52. 100 U.S. (10 Otto) 483, 488-489.
53. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 203 (2d ed. 1983).
54. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 600 (emphasis added).
55. C. SANDS, SUTHERLAND STAT. CONST. § 3206 (3rd ed. 1972). See, also, Whitney v. Robertson, 124 U.S. 190, 194 (1888).

56. Cf., id.; National Indian Youth Council v. Bruce, 306 F. Supp. 313, 317 (1973).
57. 133 U.S. 258, 266.
58. Id., at 267.
59. Reid v. Covert, 354 U.S. 1, 16-18. The Library of Congress legal analysts stress the lack of specificity in this approach: "there is no readily agreed-upon standard for determining what the limitations are." CONSTITUTION: ANALYSIS, supra note 33, at 497.
60. J. WILLIAMS, CONSTITUTIONAL ANALYSIS IN A NUTSHELL 177 (1979).
61. Cf., L. TRIEL, AMERICAN CONSTITUTIONAL LAW 169 (1976); NOWAK, ROTUNDA, & YOUNG, supra note 53, at 203-204; MILLER, supra note 20, at 143.
62. D. ENGBAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE IN A NUTSHELL 227 and 229 (1974).
63. NOWAK, ROTUNDA, & YOUNG, supra note 53, at 203.
64. Id., at 202.
65. WILLIAMS, supra note 60, at 177.
66. 252 U.S. 416, 432 and 434.
67. 263 U.S. 332, 341.
68. 299 U.S. 304, 316-318.
69. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 19-26 (1975).
70. 299 U.S. 304, 320.
71. 301 U.S. 324, 330-331.

72. 315 U.S. 203, 223, 230-234.
73. 354 U.S. 1, 16-18. On the development and operation of executive agreements, see E.S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 134-139 (rev. by H. Chase & C. Ducat, 13th ed. 1975).
74. 354 U.S. 1, 18.
75. *Id.*, at 44 (Frankfurter, J., concurring). Justice Powell's recent precautionary remark that the doctrine of stare decisis has been "perhaps never entirely persuasive on a constitutional question," should likewise be given heed. *City of Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481, 2487 (1983).
76. Quoted by Tananbaum, The Bricker Amendment Controversy: Its Origins and Eisenhower's Role, 9 DIP. HIST. 73, 76 fn. (1985).
77. *Id.*, at 81 fn.
78. *Reid v. Covert*, 354 U.S. 1, 50 (Frankfurter, J., concurring).
79. *Geofroy v. Riggs*, 133 U.S. 258, 270-272.
80. *Baker v. Carr*, 369 U.S. 186, 212 (1961).
81. Letter to James Madison, Dec. 20, 1787, in THE PORTABLE THOMAS JEFFERSON 429 (M.D. Peterson ed. 1977).
82. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 229.
83. 13 U.S. (5 Cranch) 191, 198 (emphasis added).
84. 16 U.S. (3 Wheat.) 610, 620-621.
85. *Id.*, at 628-630.
86. 18 U.S. (5 Wheat.) 153, 159.

87. Id., at 160.
88. 175 U.S. 677, 700.
89. Bilder, Integrating International Human Rights Law into Domestic Law--U.S. Experience, 4 HOV. J. INT'L L. 1,2 (1961).
90. Faust, Litigation Human Rights in U.S. Courts, Id., at 139.
91. Wright, The Law of the Nuremberg Trial, 41 AM. J. INT'L L. 3E, 57 (1947).
92. The Eichmann Court on this issue was in agreement with the I.C.J. See Eichmann Judgment, supra note 6, at 33-34.
93. The Over the Top, 5 F. 2d 838, 842 (D. Conn. 1925). A further pronouncement, though undeniably dicta, adds: "It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose, no treaty is self-executing." Id., at 845. But the U.S. Supreme Court has been silent on this issue.
94. 13 U.S. (9 Cranch) 386, 423.
95. See, especially, Symposium-Federal Jurisdiction, Human Rights, and the Law of Nations: Essays on Figliartia v. Pena-Irala, 11 GA. J. INT'L & COMP. L. 305 (1981).
96. 630 F. 2d 876, 881-885.
97. Id., at 887.
98. The Supreme Court is now considering whether or not to take cert in this case. 53 U.S. L.W. 3235 (Oct. 1984).
99. 726 F. 2d 774, 812-813.
100. Id., at 826 fn.

101. 2 C. ANTIEAU, MODERN CONSTITUTIONAL LAW: THE STATES AND FEDERAL GOVERNMENT 572 (1969). The executive agreement discussed in *United States v. Pink*, 315 U.S. 203 (1942), is surely self-executing.
102. Oliver, Problems of Cognition and Interpretation in Applying Norms of Customary International Law of Human Rights in United States Courts, 4 HOU. J. INT'L L. 59, 63 (1981).
103. Recent proponents of the Convention appear to emphasize the symbolic importance of American approval and its supposed usefulness for the Helsinki follow-up conferences. See 7 ABA, Standing Committee on Law and National Security: Intelligence Report, 1 (Jan. 1985); Murphy, Human Rights in United States Foreign Policy, 4 HOU. J. INT'L L. 133, 136 (1981); Feinrider, First Duty for the U.S. Senate: Pass the Genocide Convention, Miami Herald, Dec. 31, 1984, at 9 A, col. 3. Symbolism, however, can build false hopes and be a cruel deceiver. The value of the Helsinki follow-up meetings, and the U.N.-sponsored human rights conferences, with respect to actions of the Soviet Bloc and the majority of the U.N. membership, has proved to be a will-o-the-wisp. The United States will be the target of the genocide provisions, and not the beneficiary, if the past is also prologue.

Analysis of the Genocide Convention

by

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Preamble

The Genocide Convention is wrong in focus, misleading in content, and unpredictable as to future application. States or governments--not individuals--commit genocide [A.L.I. Restatement of the Foreign Relations Law of the U.S. (Rev.) §702 (Tentative Draft No. 3, Mar. 15, 1962)] if genocide is to be viewed as mass murder of a particular nationality or specific group. The definitions offered by Senator Pell ("the killing of an entire people") and Senator Percy ("the attempted wholesale extermination of an entire ethnic group") are better than those put forward by the Convention itself. [130 CONG. REC. S14041, S 14056, Oct. 10, 1984] Despite the claim of the Convention's preamble, U.N. General Assembly Resolution 96 (I) (Dec. 1946) did not make genocide a crime under international law nor did the Nuremberg Judgment. The Nuremberg Principles (1950) drafted by the International Law Commission, were never approved by the U.N. General Assembly. The International Court of Justice has indicated that the Genocide Convention had attained the status of a universal norm [Reservations decision, 1951], but there is no validity in either custom or state practice for this assertion. If this was so, the supposed necessity for approving the Convention would be irrelevant. Genocide has not been "condemned by the civilized world" since 1948, and there is abundant evidence to indicate that many states have engaged in one form of genocidal activity or another. The problem with the Convention's definition and listing of related crimes (undefined), is that they are so all-embracing as to become meaningless in any legal or definitional sense.

Article I

No distinction is made between "time of peace" or "time of war," nor is there any indication that war crimes have been fully spelled out by the Geneva Conventions of 1949, the Nuremberg Judgment, the Tokyo Judgment, the trials of the lesser German war criminals, and by In re Yamashita [327 U.S. 1 (1946)]. Mass murder of civilians or prisoners of war, in time of war, are covered by these precedents. The effect of this badly worded article is to attach liability to any U.S. military conflict where the enemy is of a different race, creed, or color. In fact, by the terms of Article II, conflict with another nationality of whatever race may be enough to raise the charge of genocide. The so-called Stockholm War Crimes Tribunal initiated by philosophers Bertrand Russell and Jean-Paul Sartre in 1966-67 was unanimous in its verdict that the United States was guilty of genocide in Vietnam. The racism of U.S. soldiers, plus the killing, was enough to convict the United States. One noted American legalist agreed (Richard Falk), and another (Hugo Bedau) concluded: "Not proven, not quite." (Le Blanc, 78 AM. J. INT'L L. 369, 381-382).

Article II

The definitions put forward by this Article are violative of substantive due process in American law, being vague and overbroad, arbitrary and capricious, and requiring an ordinary person of common intelligence to have to guess at its meaning. No mention is made of justification or excuse, an integral part of Anglo-American criminal law. No allowance is granted for legitimate self-defense. Under these provisions, with the victim groups being all-inclusive, any actor committing some form of violence, justifiable or not, against almost any type of victim, can be charged with the crime of genocide. The words "as such" in the first clause are a catch-all phrase which generalizes the victim category rather than particularizing it. The words "in part" are equally vague, leading some commentators and some signatories to make the claim (not effectively disputed) that a single victim would suffice for the crime of genocide. [Genocide Study, Report to the Comm. on Human Rights, U.N. Doc. E/Ch.4/Sub.2/416, ECOSOC, 31st Sess., July 4, 1978] The so-called State Department Understanding on the phrase "intent to destroy" does not clarify anything, for like the original wording, it deals with motive and not with intent. The actual intent element required in common law murder, or by the Model Penal Code approach utilized in a large number of states, is missing from this definition. Motive helps to establish first degree murder, but it is not an element of the crime of homicide. And the distinction between homicide and genocide is blurred at best in this Article. At the very least, homicide becomes a subset of genocide.

Category (a) does not distinguish between lawful and unlawful killing. Category (b) is confusing with respect to the "crime" of mental harm. The State Department Understanding on mental harm, requiring "permanent impairment of mental faculties," does nothing to explain the substantive nature of the crime. A cause of action for the intentional infliction of emotional distress in U.S. tort law contains the element of extreme and outrageous conduct (Nelovich Builders, Inc. v. Superior Court of San Bernadino, 160 Cal. App. 3d 931, 936 (1984)). Government prosecution of conscientious objectors who refuse to participate in the draft may incur liability for genocide under the fuzzy phrasing of this proscribed activity. Category (c) is likewise obscure. Under this ambiguous proscription, the United States Government would have been liable to charges of genocide by the American Indian Movement and the Oglala Sioux Civil Rights Organization in the Wounded Knee Controversy in 1979. [See statement of Facts, The Innocent Victims of the Occupation of Wounded Knee v. the United States, U.S. Court of Claims, Dec. 3, 1979. Cong. Ref. No. 4-76] Category (d) can well include government-sponsored birth control programs among minority groups, let alone the establishment of government-funded abortion clinics in minority areas. Whatever the merits or demerits of the abortion dispute, abortion is not genocide. Category (e) may be invoked in the event of a court ordering dependent children of a particular minority group to foster homes. One incidental transfer may suffice.

In sum, this Article contains no identifiable standards relating to American law, is unconstitutionally vague and unreasonable on its face because it mandates arbitrary enforcement, and fails to describe with particularity the elements of the alleged crimes. Moreover, in combination with Articles III and IV, Article II may impose strict liability, a violation of common law and contemporary criminal code provisions which dictate that felonies include both a mens rea and an actus reus.

Article III

Article III definitely imposes strict liability with respect to its enumerated acts. Once again genocide is specified in category (a) as a punishable act, without listing its substantive elements. Category (b) likewise does not contain a legal definition of conspiracy, nor does it indicate whether conspiracy or the other inchoate and complicitous crimes are to be considered lesser included offenses or independent criminality in their own right. Category (c) is in direct conflict with the First Amendment and the holding in Brandenburg v. Ohio (1969), wherein the U.S. Supreme Court distinguished between mere advocacy (as clearly proscribed in the Convention) and the "incitement to imminent lawless action." [395 U.S. 447, 449] Under this category, the controversial rulings of the federal trial and appellate courts in the Skokie Nazi Party case [Colin v. Smith, 578 F. 2d 1197 (7th Cir. 1978)] would have been rendered null and void. The Nazis would have been liable for "[d]irect and public incitement", and the federal judges themselves would have been subject to a charge of complicity (see discussion *infra*). Clever lawyers could immobilize the judiciary under various provisions of the Genocide Convention. Category (d) does not indicate when an incomplected act becomes attempt, nor does it acknowledge the defense of impossibility. Category (e) does not state the constitutive elements of complicity. In fact, it makes no distinction between complicity and the completed crime. All of the crimes mentioned in association with genocide carry the same degree of culpability and apparently require the same kind of punishment, which is violative of the basic principles of Anglo-American criminal law. [See R.M. PERKINS & R.N. BOYCE, CRIMINAL LAW 1-20 (3rd ed. 1982)]

Article IV

The basic assumption of this Article is that individuals commit genocide, when, actually, only states or governments can perpetrate that odious barbarism. All government officials are stripped of immunity from liability when a genocide complaint is filed in a domestic forum. There is to be no legislative, executive, or judicial immunity from charges involving genocidal acts and related crimes. Thus, the Congress, the Executive Branch, and the Courts are subject to process and punishment. No court will therefore be judgment proof from the effect of its own decisions, and no legislator speaking on the floor of any legislative house will be immune from prosecution. The call for punishment in all cases eliminates constitutional protections such as the presumption of innocence, the reasonable doubt standard, freedom from self-incrimination, the right to confront one's accusers, the right to a public trial, and the right to an attorney, among others.

Article V

Proponents of the Genocide Convention argue that this particular provision means that the document is not self-executing, but their view is undercut by the mandatory language of this Article, and the preceding one, on penalties and punishment. There is no explanation of what "effective penalties" might be, nor is there any distinction made once again between the act of genocide and the inchoate criminality plus complicity attached thereto. Here, as in the preceding Articles, there is a definite failure to recognize the dual nature of sovereignty as it has historically and juridically existed between the states and the federal government in the American constitutional system. The principle of concurrent criminal jurisdiction is severely disrupted, wherein "each state, with certain limitations, has the powers of a nation." [PERKINS & BOYCE, at 42].

Article VI

A combination of this Article, along with the content of Article IV, may compel the United States to subject visiting heads of state, government officials, even accredited diplomats to arrest and extradition for alleged crimes of genocide as charged by other states parties. Especially vulnerable would be South African, Israeli, and British dignitaries and diplomatic personnel. The provision for an international penal tribunal to try crimes of genocide is a ticking bomb waiting to go off. This makes U.S. officials subject to charges and process outside of the United States for alleged genocidal acts. (Nicaraguan President Daniel Ortega accused the United States of the crime of genocide in a speech before the U.N. General Assembly). There is no guarantee of due process in connection with this potential international tribunal. In fact, "international law does not prescribe general rules for such proceedings concerning burden of proof, right to be confronted with evidence, public hearing, or judicial

review...." [RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised), §431 d (ii), Tentative Draft No. 3, Mar. 15, 1982] Proponents of the Convention argue that an international genocide tribunal can only be established by treaty, but there is some legal precedent for potential U.S. participation by way of executive agreement. [See Wilson v. Girard, 354 U.S. 524 (1959)]

Article VII

Under the requirements of this article, the United States would have to renegotiate and reapprove all of its prior extradition treaties to date. Moreover, there is no guarantee that the vague and overbroad language of Article II could not also be interpreted to include political crimes, which have been historically exempted from the extradition process by the government and courts of this country. The parallel clauses in Article VII are in contradiction insofar as U.S. law and extradition practice are concerned.

Article VIII

There is some question as to whether the wording of Article VIII, particularly as it refers to the proscribed acts found in Article III, is not violative of Article 2 (7) of the United Nations Charter, which reads as follows: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter." Punitive measures could be imposed by the General Assembly where the United States has no veto and where the latter has been continually outvoted on many issues, including those relating to U.S. internal affairs (such as consideration of the right of Puerto Rico to self-determination).

Article IX

By means of Article IX, any state party to the Convention can submit a dispute with the U.S. to the International Court of Justice. In this event, the Connally Amendment and the two other U.S. reservations to I.C.J. jurisdiction, as enunciated by President Truman in August, 1946, do not apply. (This has been the view of both the Department of Justice and the Department of State). The I.C.J. has already indicated on two separate occasions (Case Concerning the Genocide Reservations and the Barcelona Traction Case) that it considers the principles of the Genocide Convention to be binding on all states, whether or not they have ratified that instrument. The likelihood that the I.C.J. would find in favor of the United States on any issue of interpretation is very small indeed.

Article XVI

The power to revise the present Convention is given to the U.N. General Assembly. There is no chance that the General Assembly will accede to revisions arising from the type of issues raised in this analysis.

Conclusion

The Genocide Convention is a badly-drawn document, many of its provisions are in conflict with basic American constitutional principles; some Articles are violative of specific parts of the Constitution itself. If the Senate were to grant its approval, the rights of American citizens may be jeopardized, the personal security of U.S. government officials may be put at risk, and the delicate balance between American criminal law and constitutional criminal procedure will be upended. The Genocide Convention has not prevented any state's repression of its own people or of conquered populations. [See L. KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY (1961)] It has not brought any oppressor to the bar of justice in any jurisdiction. It has not achieved any measure of success. If approved, the United States government, U.S. officials, and American citizens will be prime targets for adversaries seeking to embarrass this nation. Domestic genocide litigation could well disrupt the already overloaded capacity of U.S. courts. This is too high a price to pay for a country whose adherence to human rights and the rule of law needs no defending. A convention outlawing state terrorism, containing enforceable punitive measures, makes much more sense than the approval of a stale and still-born idea whose time has come, and--unfortunately--gone.

RESPONSES BY ROBERT A. FRIEDLANDER TO WRITTEN QUESTIONS FROM SENATOR ORRIN G. HATCH

Question No. 1. Should the treaty making power be used as the basis for the enactment of domestic legislation in the United States?

Answer. There are several actual and potential limitations upon the treaty-making power with respect to provisions of the United States Constitution, but neglect and erosion of these limitations have made the treaty power, in actuality, almost absolute in recent history and current U.S. practice. According to the language of *Reid v. Covert*, 354 U.S. 1 (1957), and it should be stressed that this was only dicta and not a specific holding or enunciated rule of law, courts have the power to hold treaties, conventions, and executive agreements unconstitutional if they conflict with principles set out in the U.S. Constitution. Not only has no court ever held a treaty, convention, or executive agreement to be unconstitutional, but it is also significant that the *Reid v. Covert* decision did not abrogate the executive agreements in question between the United States, Great Britain, and Japan, either in their entirety or in part. The results of that case, from the constitutional perspective, are not as clear as they have often been made out to be by subsequent legal commentators.

Moreover, with treaties, conventions, and executive agreements there is a presumption of constitutionality (as with statutes), although this has likewise never been clearly spelled out by the courts. A careful reading of the debates of the Constitutional Convention, the ratifying state conventions, the Federalist Papers, and Supreme Court opinions of the first century of the American Republic, indicate that treaties and conventions were meant to deal primarily, if not exclusively, with foreign affairs and matters of international concern, rather than with questions of a fundamentally domestic nature. This is why the Tenth Amendment never even entered the arena of juridical debate until the third decade of the twentieth century.

The first Supreme Court decision to indicate that the Tenth Amendment does not serve as a constitutional restraint upon the treaty-making power—aside from implied hyperbolic dicta in *Ware v. Hylton* (1796)—was that of *Missouri v. Holland*, 252 U.S. 416 (1920). Justice Holmes' sideswipe at "some invisible radiation from the general Terms of the Tenth Amendment," was followed by an obscure admonition to consider the past in terms of the present. *Missouri v. Holland* actually borders on the incomprehensible with respect to the Tenth Amendment. *Reid v. Covert*, on the other hand, allowed that the Tenth Amendment was "no barrier" to treaties and executive agreements, but based its dicta (for it did not announce this position as a rule) upon a reference to *Missouri v. Holland*. Thus, in current Supreme Court jurisprudence, the Tenth Amendment, as it affects the treaty-making power, is dormant but definitely not deceased. The precedential value of past decisions dealing with that Amendment, and they are few in number, is not strong enough to prevent a resurrection of Tenth Amendment limitations by a future court, if that court should so desire.

Question No. 2. Can a treaty affect or nullify the provisions of the state constitutions?

Answer. Yes. A treaty can take priority over a state constitution, and therefore, in effect nullify its provisions. This view dates all the way back to *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), that has been the position of courts and scholars ever since. But the conundrum here is that the *Ware* court stressed matters of foreign concern and state constitutional provisions which would have an adverse impact upon U.S. international relations. Neither the *Ware* court, nor its nineteenth-century successors (including the Marshall court), conceived of treaties focusing on matters of purely domestic importance overriding a state constitutional provision dealing with the same subject. Twentieth-century legal commentators, and arguably, supreme courts, have not been as prudent in their assertions. The net result has been, in the modern view, that treaties, conventions, and (impliedly) executive agreements can negative conflicting clauses of a state constitution.

Question No. 3. Can a treaty affect or nullify a state statute?

Answer. Yes. The ability of a treaty, or its contents, to nullify a state statute, or its contents, dates from the per curiam decision of *Ware v. Hylton* (1796), particularly with reference to the language found in the opinion of Justice Chase.

Question No. 4. Can a treaty affect or nullify a prior judicial decision of a state supreme court?

Answer. Yes. For the reasons stated above. It should be remembered, however, that until modern times, U.S. courts assumed that treaties were intended as international rather than domestic instruments, and that the subject matter of treaties and conventions was inextricably intertwined with the international aspects of said

documents. The contemporary view of commentators, and courts, is that it is impossible in a shrunken world to separate foreign from domestic content. The current view of most analysts, in their interpretation of Article VI and the role of treaties, conventions, and executive agreements, is that everything contained in those instruments affects everything else within the jurisdiction of the signatory parties.

Question No. 5. Can a treaty affect or nullify existing federal legislation on the same subject?

Answer. Yes, if it is last in time. The principle of *leges posteriores priores contrarias abrogant* (later laws abrogate prior contradictory ones) was first enunciated by *Whitney v. Robertson*, 124 U.S. 190 (1888) and *The Chinese Exclusion Case*, 130 U.S. 581 (1888). In other words, "the last expression of the sovereign will control." Nevertheless, courts will attempt to construe both treaties and federal statutes in such a way as to give effect to both, without violating the provisions of either, but if that is not possible, then the last in time will take precedence.

Question No. 6. Can a treaty increase the powers of the Federal Government at the expense of the states?

Answer. In theory, there is no question but the treaties, especially self-executing treaties, represent a way of increasing federal power at the expense of the states. From the historical perspective, as regards treaties, the current danger is not the usurpation of state power but rather the derogation of state power, i.e.—federalizing domestic criminality as represented by Articles II, III, and IV of the Genocide Convention. The latter is a good example of the potential of the treaty-making power to further exacerbate the present strains in the competing American federal-state criminal justice system. The doctrines asserted in the Second Circuit federal appellate court opinion, *Figlartia v. Pena-Irala*, 630 F. 2d 876 (1980), would subject the several states to the juridical control of the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Elimination of All Forms of Racial Discrimination, among others.

Question No. 7. Is a treaty or international agreement which conflicts with the constitution null and void?

Answer. This is what we are told by treatise writers and legal commentators, but it is not necessarily the view propounded by *Asakura v. Seattle*, 263 U.S. 416 (1924), and *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936), neither of which has been overruled by the United States Supreme Court. As indicated above, the meaning of *Reid v. Covert* leaves much to be desired. It lays down no specific rules, it is narrow in its holding, and the concurring opinion of Justice Frankfurter raises several unanswered questions about assertive dicta in the majority opinion and so-called prior precedents, particularly *Missouri v. Holland*. It is safe to say, however, from the historical record, that utilization of the treaty-making power to override other parts of the Constitution was not within the contemplation of the founding fathers nor approved by later court interpreters of that Fundamental Law. Nevertheless, a number of respected scholars feel that there is a serious problem with the constitutionality of the half-dozen U.S. Prisoner Exchange Treaties, to take but one example.

Question No. 8. Is the power to make international agreements limited to a particular subject?

Answer. In the late twentieth-century contemporary world, almost any subject with an international nexus has become accepted content for an international agreement. Most of the international understandings concluded between the United States and other countries are executive agreements which have been granted the legal status of treaties by several broadly-based Supreme Court opinions, the most recent being *Weinberger v. Rossi*, 456 U.S. 25 (1982). There is good reason to believe that executive agreements have attained the status of self-executing treaties, and, if so, that raises a serious concern about the wording of Article VI of the Genocide Convention, providing for the creation of an international genocide tribunal.

Question No. 9. The Genocide Convention makes any official or individual punishable for "direct and public incitement to commit genocide." Does this mean that if a member of Congress justifies the action of Jews killing Arabs in the Middle East that he can be prosecuted for genocide? What about the constitutional guarantee of freedom of speech? What about the freedom of the press?

Answer. Article IV of the Genocide Convention removes all immunity from legislators speaking on the floor of their respective legislative bodies or in a committee hearing. This means that a U.S. Senator or Representative, supporting Israeli action in an Arab-Israeli conflict, Israel's Lebanon policy, or Israeli measures of social control among the Arab population on the West Bank (and Israel has been accused of

atrocities of genocide in all three situations) can be charged with crimes relating to genocide as contained in Articles II and III.

The proscription of Article III (c), "Direct and public incitement to commit genocide", is violative of First Amendment protections as defined by *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The *Brandenburg* decision drew a careful distinction between the advocacy of theoretical violence or general lawless action and the "incitement to imminent lawless action." Article III (c) proscribes conduct which, according to *Brandenburg*, is legally permissible under First Amendment guarantees and thus is violative of basic constitutional principles. The proponents of the Genocide Convention do not make reference to the important imminent threat of violence test, and thus distort the adverse constitutional consequences which must result from the application of that Article.

Question No. 10. Could the Genocide Convention lead to the creation of an international penal court for trials of American citizens for genocide without the constitutional safeguards and legal rights accorded persons charged with domestic crimes?

Answer. There is no question that, through the wording of Article VI of the Genocide Convention, an international genocide tribunal could be created, either through treaty or executive agreement which would subject American citizens to penal process without basic constitutional safeguards. In fact, a model court statute was developed prior to the signing of the Convention by a U.N. commission, which fails to establish the presumption of innocence, does not give a defendant the right to confront his accusers, permits no right to a jury trial, grants no protections against hearsay evidence, allows for no habeas corpus, provides no fundamental fairness protections, lacks an appellate review process, and which fails to apply any reasonable doubt standard in reaching verdicts. The model statute appears to adopt the accusatory European approach rather than the adversarial Anglo-American individual rights-oriented procedures. One might add that, given the very nature of this proposed tribunal, any actual genocide litigation would become a media extravaganza, although there is no provision for a public trial in either the Convention or the model court statute.

Question No. 11. Would an American charged with the commission of genocide in the United States, be sent out of the country for trial before an international penal tribunal, if such a court were established, and its jurisdiction accepted by the United States under the Genocide Convention, in light of the Sixth Amendment to the United States Constitution which gives to every person accused "the right of a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed?"

Answer. Under the terms of Articles VI and VII of the Genocide Convention, an accused American offender, if an international genocide court were to be established, could not prevent extradition to the tribunal authority by legal means, since Article VII of the Genocide Convention does not permit any political offense exemption nor allow for the failure to comply with the mandate for prosecution and punishment laid out in Article IV. One might add, that neither in the Genocide Convention itself, nor in the proposed model statute for a genocide tribunal, is there any probable cause requirement. Surrender by the United States Government of an accused American offender charged with genocide or a related crime, by the very language of the Convention, let alone the provisions of the proposed genocide court model statute, would be in violation of the Sixth Amendment. This is why I have proposed a reservation to Articles IV, V, and VI guaranteeing the procedural safeguards found in the U.S. Bill of Rights, plus the presumption of innocence for any genocide trial. The proponents of the Convention argue that it is not self-executing, and that the terms of Articles V and VII will allow the United States to bring the Convention's provisions within the U.S. constitutional system by way of implementing legislation. I am not convinced of this, as for example with reference to the language of Articles IV and V, which is mandatory with respect to the liability of all government officials and the imposition of "effective penalties" without distinguishing between degrees of harm. Once again, the nature of the current Prisoner Exchange Treaties brings to mind a very uncomfortable analogy with the proposed process to be adopted by an international genocide tribunal.

Question No. 12. Article IX of the Genocide Convention provides that disputes between parties to the Convention relating to "the interpretation, application, or fulfillment" of the Convention "shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." Does Article IX of the Genocide Convention make the International Court of Justice, instead of the Supreme Court, the court of final appeal?

Answer. That depends on what is being appealed. Only states can be parties in interest before the International Court of Justice, but the Genocide Convention pro-

scribes and penalizes individuals, not states or governments. Proponents of the Genocide Convention, including Reagan Administration officials, as well as some of the Convention's critics, have often referred to the sole probability of the United States being summoned before the world court on a charge of genocide, or related charges. This is not entirely correct. The United States, or any other state party, can be required to appear before the court, by the terms of Article IX of the Convention, on matters of interpretation of the provisions of the Convention, which may or may not involve individual defendants, but which would almost always involve the obligations of the signatory state. In addition, however, Article IX raises the nature of a state responsibility which is not mentioned in any other article of the Convention and which, it appears, will be strictly a matter for ICJ determination. This provision, which could allow the United States to be accused of responsibility or complicity by a complainant signatory, transforms the nature of the Convention when it is to be brought before I.C.J. jurisdiction. On the one hand, in matters of interpretation over the carrying out of the Convention's obligations, the International Court will be allowed to determine the application of U.S. domestic law. On the other, the world court will be permitted to determine genocidal responsibility of states—and possibly the United States—as a court of the first instance. It is for this reason that I support a reservation to Article IX which would (1) require the consent of all parties before the International Court could exercise jurisdiction, and (2) would attach the Connally Amendment to the Genocide Convention where it would otherwise not apply, despite the fact that it constitutes a major reservation to U.S. accession to I.C.J. jurisdiction from the time of that original accession.

Question No. 13. Does Article IX override Article III, Section 1, of the United States Constitution which states, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish;" and Article III, Section 2, which states: "The judicial powers shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made under their authority * * *?"

Answer. The United States, with three reservations, acceded to the Statute of the International Court of Justice on August 14, 1946. Neither the Congress nor the courts have objected to U.S. litigation of matters of international law, as a state party, in the International Court of Justice. The dangers posed by Article IX of the Genocide Convention, as indicated above, are twofold: (1) That the I.C.J. would become, in effect, the arbiter of such U.S. domestic law and constitutional principles as related to the provisions of the Genocide Convention, and (2) that the United States government may become a party defendant to a charge brought by another signatory, with the I.C.J. acting as the court of final judgment. This was not foreseen by the framers, nor was it contemplated by some of the Convention's most dedicated supporters in this country during the past three decades.

Question No. 14. What will the United States gain by signing the Convention?

Answer. The arguable benefits deriving from a symbolic gesture toward human rights are very few. We are much more likely to be the target of genocide litigation, either our officials or (as indicated in the prior answer) our government, than being able to target another government or its officialdom for crimes of genocide as defined by the Convention. To say that the Genocide Convention will make a difference in negotiating with the Soviets and in bringing about greater Soviet Bloc compliance with the Helsinki human rights accords is to say that bears will fly and fish will sing. There is no scintilla of evidence that the Genocide Convention has changed the history of the world one bit. U.S. adherence to the Genocide Convention will not bring about any major improvement in human rights in any part of the world, but it may make the United States, and its ally Israel, special targets in genocide litigation.

Question No. 15. What will the United States lose by not signing the Convention?

Answer. The United States will lose nothing by not ratifying the Convention. The United States is, has been, and will continue to be a leader in human rights practice and advocacy in the world community. The American record and achievement is well known, and it will not be diminished by a failure to ratify the Convention, particularly after a wait of more than thirty years. It should be noted for the record that some of the nations which have ratified the Convention are among the worst violators of its basic prohibitions.

Question No. 16. Why is it undesirable to federalize criminal law?

Answer. Our criminal justice system is based upon twin state and federal sovereignties. This is implicit in the limitations on the protection from double jeopardy found in the Fifth Amendment and in the notions of due process as propounded by the United States Supreme Court. To federalize criminal law would disrupt the deli-

cate balance of constitutional powers which now exist between and among the state and federal governments. Federalizing criminal law would expand the power of the federal governments. Federalizing criminal law would expand the power of the federal governments beyond its original constitutional construction and diminish the political authority of the states to the point where they would be mere constitutional appendages.

Question No. 17. What exactly is the legal status of the State Department's three understandings and one declaration?

Answer. The three understandings and one declaration submitted by the Department of State are merely clarifications, and two hardly do even that. They have not legal consequences and are advisory rather than compulsory. They fail to resolve in any significant way the real problems posed by the language of the Convention, and are mainly an attempt to soften Senate concern about the Convention's imperfections. No other signatory party will be bound by their construction.

Question No. 18. What is the significance of the ICJ ruling on reservations?

Answer. To quote from the I.C.J. *Reservations Case*: "If a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention. If, on the other hand, a party accepts the reservations as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention." *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. 15, 29-30.*

Question No. 19. What is the significance of the ICJ's view of the universal application of the Convention?

Answer. The International Court's statements concerning the universal application of the Genocide Convention in the *Reservations Case* and the *Barcelona Traction Case* are dicta in both instances, are related to the holdings of either decision, and without legal effect. The Court has implied that the Genocide Convention is a peremptory norm (*jus cogens*), but in that circumstance, there would be no need for a convention.

Question No. 20. Could an international genocide tribunal be created by executive agreement?

Answer. Without a doubt, *Wilson v. Girard*, 354 U.S. 524 (1957), gives clear indication that an international genocide tribunal could be created by executive agreement. The Acting Assistant Attorney General, Ralph W. Tarr, has also conceded this possibility in testimony before the Senate Foreign Relations Committee. Since *Weinberger v. Rossi* (1982) holds executive agreements to have the status of treaties, such an agreement could also be self-executing.

Question No. 21. What difficulties might occur with foreign diplomats and dignitaries (i.e., Israeli and British) in the United States under the Convention?

Answer. With U.S. approval of the Genocide Convention, the United States (in accordance with Article VII) may be compelled to arrest and extradite visiting Israeli or British diplomats, or dignitaries, for alleged crimes of genocide (or related acts) as claimed by hostile governments and their political allies. This could include a visiting prime minister, foreign minister, or defense minister temporarily in the United States on a goodwill trip, let alone diplomatic personnel residing in this country. One should also note that American diplomats and government officials will also be potential hostage to charges of complicity as a result of U.S. aid and assistance to the Israeli and British governments. The political complications from such an untold incident could truly be explosive.

RESPONSES BY ROBERT A. FRIEDLANDER TO WRITTEN QUESTIONS FROM SENATOR CHARLES E. GRASSLEY

Question No. 1. Could an individual be prosecuted for a crime of genocide under the Treaty, before an international tribunal, when his crime consisted of a single act against a single individual?

Answer. According to the Special Rapporteur for the Commission on Human Rights of the U.N. Economic and Social Council (1978), and a number of important commentators, an individual could be charged either with genocide of a related crime by a single act directed against a single victim. Convicted assassin James Earl Ray, the murderer of Reverend Martin Luther King, Jr., fits this construct.

Question No. 2. Does the absence of "political" group persecutions in the genocide definition, mean that designation of an individual or ethnic group as an "enemy of

the state," and subsequent persecution of that group, would escape international prosecution for the crime of genocide under the Treaty?

Answer. A political dissident, who is also the member of an oppressed ethnic group in opposition to the ethnic or racial group controlling the oppressing government, could be the subject of an extradition request by that particular state if the dissident had sought asylum in another jurisdiction. The United States and the requesting government would have to amend their extradition treaties to include the crime of genocide in that instance. However, the nature of traditional extradition requirements might be somewhat altered in the event of the creation of an international penal tribunal, and that might serve as a substitute means of sophisticated political persecution.

Question No. 3. If this is true, could Hitler have designated Jews as enemies of the state, and then systematically pursued their "extermination," unfettered by any provision of the Genocide Convention, if it was then in effect?

Answer. The Jews would be covered by the Genocide Convention's wording in Article II of "ethnic . . . or religious group." Thus, Hitler's persecution of the Jews come under the provisions of the Genocide Convention, but it was the Holocaust which brought about the drafting of the Convention in the first place. As long as Hitler stayed in power and merely persecuted Jews in Germany, very little—if anything—could be done under the language of the Convention.

Question No. 4. Would the Raj of India, be permitted to execute all Sikhs as "enemies of the state" following the assassination of Indira Ghandi, rather than as an ethnic or religious group?

Answer. The Government of India, if it executed all Sikhs as an ethnic or religious group, would be committing genocide under the terms of the Genocide Convention and in the classic traditional sense. The Genocide Convention does not cover the political category however, of "enemies of the state." If that terminology is used as a cover for government persecution, crimes of genocide would depend upon what groups were persecuted and what the intent of the persecuting government might be.

Question No. 5. Was it the east-block, or communist nations, that objected to the inclusion of "political" persecution in the Convention, as has been alleged?

Answer. The Soviet Union specifically objected to the inclusion of "political" groups as designated victims in the Genocide Convention during the drafting period.

Question No. 6. Why are the Convention's terms aimed at individuals, rather than governments, when it is difficult to imagine genocide being conducted against a whole segment of a population without the cooperation of the state?

Answer. I do not understand the rationale for focusing on individuals without at least allowing for government complicity. Individuals cannot commit genocide, even if they are heads of state. Governments can and do commit genocide, and there should be provision for state responsibility in the Genocide Convention. I believe that the rationale for individual liability is derived as a sort of precedent from the Nuremberg and Tokyo War Crimes Tribunals.

Question No. 7. Was it the Soviets that objected to the language "with the complicity of governments" to the genocide definition?

Answer. The Soviet Union definitely objected to the phrase "complicity of government" during the drafting of the Genocide Convention, and despite initial French opposition, that terminology was eliminated from the final text.

Question No. 8. Would ratification of the Treaty supercede all previous treaties and acts of Congress that are inconsistent with its terms, including bilateral extradition treaties with other nations?

Answer. The rule of construction with respect to statutes and treaties is that if ambiguous or contradictory language cannot be reconciled, then the last in time shall prevail. A subsequent treaty or executive agreement will obtain over a prior statute or treaty. However, the provision of Article VII for mandatory extradition cannot be implemented without adding the criminality described in the Convention to all U.S. bilateral treaties. Testimony by the Legal Advisor of the Department of State before the Senate Foreign Relations Committee indicated that genocide was covered by other criminality contained in our bilateral extradition treaties. This would be a negation of the requirement of specificity and definiteness now found in the substantive criminality defined by those treaties, and thus this approach would represent a violation of due process of law as it exists in this country.

Question No. 9. Would any person charged with genocide be tried before an international tribunal, even if they are tried by their own nation for the same or an underlying act?

Answer. The Genocide Convention appears to allow for either national or international process against accused genocide offenders, but not both.

Question No. 10. If this is true, would that not offend the Constitution's provisions against "double jeopardy?"

Answer. There should not be a double jeopardy problem, although there seems to be no *res judicata* principle attached to Article VI. If this is so, then an acquittal on the national level might not prevent another trial by an international genocide tribunal which would indeed violate Fifth Amendment protection against double jeopardy.

Question No. 11. Would a person who commits murder of a person or group of persons because of a racial or religious hatred, in one of our states, be tried for genocide in a federal court rather than murder or mass murder in the state in which the violence occurred?

Answer. If a person of one racial, ethnic, national or religious group is responsible for the homicide within one state jurisdiction of another member or members of a different racial ethnic, national, or religious group, and kills with the intent of affecting the entire group, then the murderer has committed a crime of genocide under the terms of the Convention. Genocide would be a federal crime and murder, or the related criminal acts of conspiracy, complicity, and solicitation would be federalized. This would therefore upset the prevailing balance between federal and state criminality and place murder, when related to crimes of genocide, solely under federal authority.

Question No. 12. Would a person tried in United States courts for the act of genocide, be accorded the constitutional and legal protections that an accused defendant enjoys for other crimes under U.S. law?

Answer. A person tried in United States courts for an act of genocide would be extended all constitutional and legal protections of due process, subject to the imprecise and ambiguous nature of the substantive criminality involved.

Question No. 13. Would a person accused of the crime of genocide before an international tribunal be accorded the protections an accused person has in the United States, even if he is a U.S. citizen and the crime or crimes occurred within U.S. jurisdiction?

Answer. According to the Draft Model International Genocide Court Statute drawn up by a 17 member U.N. committee in 1951, several significant protections (such as trial by jury and the presumption of innocence) would be denied to any genocide defendant brought before an international genocide tribunal.

Question No. 14. Would a congressionally passed statute expanding the rights of the accused, or an evidentiary ruling of a judge that expands those rights, in a prosecution of an individual in U.S. courts for the act of genocide, subject the legislators or judges to prosecution as well?

Answer. A broad reading of the provisions of Articles III and IV of the Convention could in fact result in the prosecution of United States judges or legislators for complicity in preventing judgment and punishment of the crime of genocide.

Question No. 15. Would American military personnel, serving in time of war, be subject to punishment for the crime of genocide for acts that involve the taking of life of enemy troops, or the forced relocation of civilian populations in a "war zone?"

Answer. American military personnel, serving in time of war, would indeed be liable for punishment under Article I of the Genocide Convention when taking lives of enemy troops of a different nationality, race, ethnicity, or religion, such as occurred during the Vietnam war. Forced relocation of civilian populations in a war zone meets the requirements of Article II, if done with the intention of affecting the entire target group.

Question No. 16. Would the Treaty be self-executing, or would legislation be needed to enforce the Genocide Convention as it applies to the United States?

Answer. It is my belief that several sections of the Genocide Convention are self-executing, and I have testified to that effect before the Subcommittee on the Constitution and before the Foreign Relations Committee.

Question No. 17. Would ratification subject any citizen of the United States accused of this crime to international jurisdiction, without the possibility of the United States to object to the jurisdiction of the tribunal?

Answer. Ratification would not per se subject any citizen of the United States accused of this crime to international jurisdiction, but the creation of an international genocide tribunal, either by treaty or by executive agreement, would be another matter. In the latter instance the answer might well be yes.

Question No. 18. Would the state of Israel, or any of its officials and citizens be subject to international prosecution under the Genocide Convention, upon the complaint of Yassir Arafat or the P.L.O., that its West Bank settlement policies constitute genocide against the Palestinian people?

Answer. The state of Israel would be a logical and inevitable target of international prosecution under the Genocide Convention, particularly once the United States

has ratified that agreement. However, Yassir Arafat and the PLO would not be proper complainants. Syria, Lebanon, Jordan, or Saudi Arabia, to mention only a few potentially hostile Arab states, would be another matter.

Question No. 19. If so, would Prime Minister Peres, or other Israeli officials be subject to arrest while visiting the United States, and subsequent extradition, upon the complaint of the P.L.O.?

Answer. Prime Minister Peres and other Israeli government officials, when visiting the United States, or Israeli diplomats residing within the United States, would be subject to arrest and extradition upon complaint from another government, including a rejectionist Arab government, but not—at this time—from a complaint by the PLO. The latter could, however, pressure a complaint Arab regime into making such complaint.

Question 20. Could the actions of this government to reduce budgetary deficits by reducing entitlement or other social welfare programs that tend to disproportionately benefit ethnic or religious groups, constitute genocide?

Answer. No, budgetary actions aimed at reducing deficits and disproportionately affecting a particular racial, ethnic, or religious minority group would not come under the Genocide Convention. Transferring minority children from their natural parents to foster parents, if the number was large enough in one jurisdiction, or if the foster homes or parents were of another racial, ethnic, or religious type from the children being transferred, would provide an opportunity for some creative lawyering with respect to the Convention.

Question 21. Given that the Nuremberg Declarations found that the promotion of abortions among minority populations amounted to genocide, could not the location of abortion facilities in neighborhoods that are primarily made up of one race, constitute genocide?

Answer. The funding of abortion facilities in neighborhoods primarily made up of one race and involving only members of that race might well constitute the crime of genocide under Article II of the Convention.

Question 22. Do you believe that had this Treaty been in effect, and Germany a party to it in the 1930's, that Hitler would have been prevented from pursuing the elimination of the Jewish people, and the others that were persecuted?

Answer. I do not believe that the Genocide Convention as presently constituted, let alone the monumental indifference to the practice of genocide in the world community for the past thirty-five years, would have prevented Adolph Hitler from his persecution and extermination policies directed against German and European Jews.

Question 23. Do you believe that Stalin would have been prevented from fostering the mass-starvation and executions of the Ukraine?

Answer. Likewise, I do not believe that the Genocide Convention would have, or could have, prevented Joseph Stalin from inaugurating the mass starvation policy and widespread executions in the Ukraine.

Question 24. Do you believe that the mass executions of the Cultural Revolution in the People's Republic of China could have been prevented by this Treaty?

Answer. I believe the same applies to the rampages by the Cultural Revolution in the Peoples' Republic of China. Moreover, Red China having a homogenous population, does not meet the national, racial, religious, and ethnic elements required by Article II.

Question 25. Why were not the mass executions of Kampuchea stopped by the Genocide Convention?

Answer. The horrors of Kampuchea—the worst since the perpetration of Holocaust—were carried out before an indifferent world, which as in the past, was aware of the slaughter, but nonetheless chose not to confront the barbarism unleashed by the infamous Pol Pot regime. The United States, one might add, never withdrew recognition from the barbaric Khmer Rouge government of its successor, not technically in exile.

Question 26. Why is the persecution of the Mesquito Indians in Nicaragua not the subject of a genocide prosecution right now?

Answer. The great majority of the United Nations, including many of America's closest allies, favor the Sandinista regime. Accusations of genocide would undermine the Sandinistas and would embarrass its supporters in the world community. The United States, not having ratified the Convention, cannot bring charges against the Sandinistas (which would have to be done in a Nicaraguan court!), but it should also

be remembered that President Daniel Ortega has accused the United States of fomenting genocide in Nicaragua.

Question 27. Does the advocacy of religious or racial hatred, constitute an act of Genocide under the Treaty's "incitement" provision, and thereby violate the First Amendment's protection of "free speech" regardless of how offensive the speaker is?

Answer. I believe that the incitement clause of Article III is directly opposed to the holding of *Brandenburg v. Ohio* (1969). The position of the State Department that the language of this Article is consistent with the terms of the Genocide Convention is poor interpretation and ill-advised.

Question 28. Does the Treaty permit the United States or other international tribunal, to cite the United States or any individual or government official, for genocide, by failing to act to pass legislation implementing the Treaty?

Answer. I believe that much of the Genocide Convention is self-executing, but for those sections which are not, the possibility certainly exists that another signatory, or the U.N., could lodge a complaint in the world court against the United States for its failure to implement properly the terms of the Convention.

Question 29. What would constitute "causing mental harm" under the provisions of the Treaty?

Answer. Despite the so-called United States Understanding, I do not understand the limitations on the phrase "causing mental harm" aside from the attempt to distinguish a temporary and permanent impairment of mental faculties.

Question 30. Would the failure of the United States to act to restrain the persecution of a people in another country, subject to the President or the Secretary of State to prosecution for an act of genocide before an international tribunal?

Answer. No, I do not believe that the failure or omission of an American President to take action against a regime or a group in another country to prevent the crime or crimes of genocide would in any way subject either the President or the Secretary of State to prosecution for complicity or of any other criminal act specified in the Convention.

Senator HATCH. Thank you, Doctor. I will have to submit a number of questions because of my time schedule.

It is a general principle of constitutional law that any given provision of the Constitution must be construed in the light of other provisions of the same instrument. Are there then provisions in the Constitution which impliedly limit the treaty-making power, so that if a treaty be made which conflicts with such provisions, such treaty would be unconstitutional? If so, what are they?

Mr. FRIEDLANDER. In the treaty-making power, one, the Senate has to give its advice and consent; and two, the courts have interpreted the Constitution as placing possible limitations upon the treaty-making power with respect to domestic legislation.

The truth of the matter is, if one takes a look at the long history of American jurisprudence from the *Ware v. Hylton* case in 1796 down to the present, most of the comments of the Supreme Court are made in dicta-like statements, often ambiguous, often unclear. The one case dealing with treaties conflicting with the Constitution being *Reid v. Covert*, which is not very clear, so that I think there is still a great deal of ambiguity, a great lack of clarity in that area.

If I may cite my distinguished colleague sitting next to me, in his prepared statement, he does say that he believes the necessary improvement of the laws must be considered as the basis for new legislation. My response to that is I would hope not.

I think the Court has yet to spell out clearly and convincingly what the limitations on the treaty-making powers are. The Founders, or the framers of the Constitution, at the time of the drafting of the Constitution, at the time of the writing of the Federalist Papers, at the time of the State conventions ratifying the Constitution, viewed article VI as only dealing with foreign affairs and for-

eign matters. This was true through all of the jurisprudence down through the 19th century to the case of *Missouri v. Holland*. There was no concern for the first century and a quarter in the history of this country about treaties involving primarily domestic legislation. That was a 20th century contribution.

Professor MOORE. Mr. Chairman, it is clear constitutional law today, and I use that term deliberately in light of the discussion we have had, that the Constitution prevails over a treaty as well as prevailing over State and Federal legislation that may be inconsistent. Some of the statements you have heard speculate about what the Supreme Court might do, but we don't need to speculate. The Court has clearly settled the issue in *Reid v. Covert*.

I might add also, Mr. Chairman, that some of the arguments that have been made seem to me, really, to have not raised any serious constitutional or legal issue. We have heard that somehow there is a lack of clarity as to whether this treaty is self-executing. I know of no serious debate or argument that this treaty is not, in fact, self-executing. Even Attorney General Brownell testified in 1950 hearings that this treaty was not self-executing. As pointed out by my colleague, even if it were self-executing, in this case, it could not be because the administration has a declaration saying that we must enact domestic legislation before the treaty can be ratified. That is the second answer to any potential constitutional problem here, and that is this treaty cannot come into force in the United States until legislation scrutinized carefully by this committee has been passed by the Congress of the United States and signed by the President.

Mr. Chairman, I would also like to point out that, in my judgment, the arguments made with respect to inconsistencies between the first and fifth and sixth amendments and this Convention are without merit. The first amendment issues have been clearly met in terms of the language of the Convention and incitement is not protected by an amendment in the United States. Even the American Civil Liberties Union which testifies rather carefully in favor of the first amendment has seen no encroachment on the first amendment in this particular case.

If we were to accept the argument that the kinds of extradition agreements that we have made here are in violation of the fifth and sixth amendments, the real effect of that is that every single extradition treaty the United States has with any country is unconstitutional. I submit that is nonsense, Mr. Chairman. That is not the reality of this Convention. If any of these extradition issues were problems, they can be addressed in the implementing legislation.

I would like to point out one additional issue and discuss whether the United States would be placed at enhanced risk by accepting this Convention. I would like to emphasize that already under accepted principles of customary international law, genocide is a crime already binding on the United States under international law. We are already subject under the optional clause acceptance in the International Court of Justice to be taken before the court for disinformation reasons just as we were very unhappily and wrongly in the Nicaragua case.

By ratifying this Convention, what we do is we change a vague, customary international law standard to a standard that comes with understandings that clarify what the United States intent is and that comes with a far more defined notion of what is genocide which limits the basic concept.

Finally, Mr. Chairman, let me just speak to this point about political groups. That is subtly correct, and I think the treaty might have been stronger had it had those provisions in it. Nevertheless, those have not given the Communist countries the free ride. I pointed out two examples in which I believe this behavior of Communist countries violates the Genocide Convention definition. In addition to that, if the United States were to ratify, under article XVI of the treaty we would then be able to move forward to seek to alter the definition. After we ratify we should continue to call attention to the totalitarian state abuses. My own feeling is that the United States should proceed year after year under article XVI of the Convention to say that we should change the definition to include political. We would be in a far stronger position to do that and to embarrass the Soviet Union which is the nation that has sought to block that, but only if we ratify. I would like to see it raised every year as a signatory and as a country that has acceded under article XVI of the Convention.

Mr. DE SEIFE. Mr. Chairman, again, I hate to say this. I do take issue with what Professor Moore says. I am impressed by the fact that he is so sure about everything and everything is crystal clear. I think the only thing that is clear is that it is very muddy, indeed, something which we don't need.

To talk about *Reid* as a cornerstone, as a constitutional document which is inviolate, to me that does not have that much merit because the Supreme Court could change *Reid* tomorrow. If you read Judge Kaufman's opinion in which he talks about crimes against nations, or the law of nations having to be interpreted as the law of nations is conceived today and you conclude that it is Judge Kaufman's own conception of what is a modern-day crime against nations that is involved. Putting it bluntly, there is nothing wrong with the Genocide Convention if you want to use it as a propaganda forum. The problem is with our constitutional form of government, with our Constitution which mandates our not ratifying symbolic treaties. Treaties with us are very serious business and the Convention does, no matter what Professor Moore says or any other distinguished colleagues may say, impact on domestic legislation.

I would like to point out that world opinion is not a reason for signing a treaty under American constitutional law.

Talking about procedure, I would like to ask Professor Moore how the United States, after it has ratified this Convention, is going to bring Nicaragua before the International Court of Justice when, in fact, the International Court of Justice has no jurisdiction over individuals? What charge shall we bring against Nicaragua, since governments cannot be charged with genocide. The International Court of Justice is not bound by any American legislation, so therefore I say it is wrong to suggest, under our unique system, that we should pervert the definition of treaties under the Constitution by signing a treaty that is worthless, which is bad law and

should be sent back and be rewritten. If we want leadership, let the United States go before the United Nations and rewrite the thing the way it should have been done in the first place.

Mr. MURPHY. Professor Moore may want to answer the last question that Professor de Seife raised himself, but let me take a shot at it because I think it is an important issue. How could the United States bring Nicaragua before the Court of International Justice?

We could bring an action against Nicaragua under article IX of the Convention. I would interpret the Convention as precluding a state from committing genocide and giving rise to state responsibility for failure to apprehend, prosecute, and punish those individuals that commit genocide. I would differ with my colleague, Professor Friedlander, who stated that states, not individuals, commit genocide. The state is an abstract notion. The concept of individual responsibility for genocide was clearly established at the Nuremberg trials under the charge of crime against humanity.

Let me respond to the question you asked, Senator Hatch; that is: Are there any provisions in the U.S. Constitution which expressly provide that the Constitution will prevail over the terms of a treaty that conflict with the Constitution?

The answer, of course, is no, there is no such express provision in the Constitution, which is why this issue is before us in the first place. It came up 30 or more years ago. But it has been clearly established by *Reid v. Covert* and other sources that the Constitution does prevail.

Moreover, I would suggest there is no danger of that decision being reversed because there is no one who wishes to reverse it. No one that I know of is going to argue that a treaty can prevail over the U.S. Constitution, so it is simply not going to happen.

Last, of course, there is the question of whether there are provisions in the Genocide Convention that would violate the U.S. Constitution. To address that question adequately, I would have to spend many more hours. But the simple answer is no. These questions have been coming up for 30 years. They have been answered again and again. They are addressed in the various written statements submitted this morning, and we will leave it at that.

I will say just one word in conclusion. I would be strongly opposed to U.S. ratification of the Genocide Convention with the kinds of reservations that Professor Friedlander has proposed. It would make a mockery of U.S. ratification of the Convention and, indeed, if the issue came before the International Court of Justice, the Court would surely hold such reservations contrary to the object and purpose of the Convention.

There are no constitutional defects, in my opinion. The United States should ratify this Convention.

Thank you, Mr. Chairman.

Senator HATCH. I have to leave, but I have a number of other questions I would like to ask of you while you are here. I will ask Mr. Michael Loyd Chadwick, a member of my staff, to continue with the questions. This has been a particularly informative panel before the committee. I have seen a wide disparity of beliefs. There are certainly differing points of view. I think we will benefit a lot more if we can get answers to the rest of these questions. I will keep the record open so anyone on this subcommittee can ask ques-

tions. We will keep the record open until the end of the week. I am very happy to have been here.

If you will forgive me, I think it is important enough to have Mr. Chadwick continue with some questioning. The balance we will ask you to answer in writing.

Mr. CHADWICK. Under the definition of genocide in articles II and III, "conspiracy to commit genocide" is included as punishable as is "direct and public incitement to commit genocide." Would enabling legislation proscribe in U.S. law advocacy of genocide as genocide is defined in article II?

Mr. FRIEDLANDER. I think the problem with article II, as I said in my testimony earlier, is a problem of specificity, precision, and definiteness. So the subsections there, I think, are again, to repeat, vague and overbroad. Therefore, I disagree with my friend and colleague, Professor Murphy.

We are told article III(c) deals with direct and immediate incitement. As a matter of fact, I think in one of the questions submitted to us, the example of an American Senator or an American Representative on the floor of the Senate or the House, speaking on behalf of Israel and its actions taken against the Palestinians who, incidentally, have accused Israel at times of genocide, can be taken to meet the requirements of the Genocide Convention on the advocacy or the direct and public incitement to genocide.

I will maintain that the language of article II is disturbingly imprecise and is obscure and, therefore, makes this a serious question wherein the legislation to be passed would have to conform to the general rules for legislation, and, specifically relating to this convention, would have to be precise and definite in its meaning.

Professor MOORE. The language of article III picks up the concept of conspiracy and explicitly uses the direct and public incitement phraseologies drawn from American criminal and constitutional law. In the United States, conspiracies are criminal. There is no provision of the U.S. Constitution that says the concept of conspiracy is one that violates the Constitution. The distinction under the first amendment is one between advocacy and incitement. The language here is direct and public incitement. I think that is a very carefully and narrowly drawn phrase, one in fact drafted by the United States. Direct can refer to the immediacy of the threat. Indeed, I think that is the principal meaning one would take from context.

Whatever any differences people may have as to the precise scope of that language, I think that can easily be dealt with in implementing legislation. It would be a very easy matter to draft carefully worded implementing legislation that would implement these provisions and not violate the Constitution of the United States.

I might add we have that on the good authority of no less than one of the Justices of the Supreme Court of the United States today who testified on this issue some years ago. Then Assistant Attorney General William Rehnquist stated specifically on the first amendment point that there was no violation of the first amendment in this case under the Convention and there could not be.

I might add even in the event there was some kind of implementing legislation passed that would be in violation of the Constitution

here, it simply would be unconstitutional as would any treaty obligation, so in no event is it possible under American constitutional law for us to violate the Constitution here as a matter of domestic law.

Let me just briefly also associate myself with the remarks of Professor Murphy in seeking to oppose the kinds of additional reservations that have been put forward today. I think they would be extremely harmful. I think frankly they are frivolous and have no basis in sound constitutional law or legal principles, and I think they would be harmful to the national security and foreign policy of the United States.

I would also like to associate myself with the answer Professor Murphy has given to the question addressed to me as to how we would go about seeking to make a case in the ICJ against the Sandanista leadership for genocide against the Miskito Indians. I think the answer it is based on a combination of article I and article IX of the treaty, in which there is an obligation of each member state to prosecute those individuals who may be guilty of genocide and, under article IX, would be submitted to the court.

Mr. DE SEIFE. First of all, even insofar as the first amendment is concerned, the pendulum swings in the United States. As late as 1950, certain actions were deemed to be criminal which now are part of free speech. We have to remember that the Vietnam era injected a concept of freedom of speech which wasn't quite subscribed to prior to the Vietnam war. Things change and it is because of the changing nature of our conception as to what our first amendment means that we have to be careful not to tinker with it by having an alien concept injected. Freedom of speech per se in many countries—people don't even understand what it means. Our concerns are primarily and uniquely American.

On the other hand, it is true that most of the Western democracies which share our Judeo-Christian heritage have similar but equal approaches. Under French law, both incitement and conspiracy can be and are considered criminal but not exactly in the sense of our American jurisprudence.

Again, I ask insofar as the International Court of Justice is concerned—Bangladesh, if I recall correctly, filed an action charging genocide against 195 Pakistanis. Where did that case go? Well, the International Court of Justice has no jurisdiction over Pakistanis individually and Pakistan was not about to be made a party to this case. Let's face it: We as American lawyers and, again, this is unique, labor under the adversarial system which means that for every proposition that any one expert or lawyer gives you, you can find counter propositions. That is why I say there is only one thing that, so far as I am concerned, is clear, and I am not contradicting what I said earlier. What is clear is that the U.S. Constitution does not provide for us entering into conventions or treaties for public relations gimmickry or for symbolism.

Mr. MURPHY. It is important to recognize that because of the language of the Genocide Convention, and because of the language of implementing legislation that would be drafted to ensure precision and that the Constitution would prevail, there would be no danger that a person would be punished for genocide in a manner offensive to our basic values. I think that is clear.

If the United States provides all of these protections because of our Constitution and implementing legislation, would this constitute a violation of the Genocide Convention for which the United States might be held accountable, say, before the International Court of Justice? I think the answer is clearly no.

I don't know how much clearer you can get in article III(c), language introduced by the U.S. delegation and introduced with a statement which was not challenged that the purpose of this language was to avoid constitutional free speech problems. So, I think the issue should be answered quite simply there is no danger at either the international level or the domestic level that persons would be tried or punished for genocide in a manner that violates free speech concepts embodied in our Constitution.

Mr. CHADWICK. There are two remaining questions, and I would ask if you would respond specifically to the question.

Mr. Friedlander, what difficulties might occur with foreign diplomats and dignitaries, for example, Israeli and British, in the United States under the convention?

Mr. FRIEDLANDER. I can see a great deal of difficulty. I can see some Arab state charging an Israeli diplomat, visiting dignitary or government official who happens to be residing or visiting the United States with the crime of genocide, and then requesting extradition. I could also see this happening with respect to the provisional IRA, and for friends of the provisional IRA in the United States, where individuals, either public officials or private individuals, go to charge British diplomats, visiting dignitaries, or the prime minister or foreign minister, with being involved in a crime of genocide and creating a diplomatic crisis in addition to a severe legal problem. I do see that as a problem, and I am concerned about it.

Professor MOORE. I do not see any problem there and, further, I consider it bizarre to believe that anyone would seriously consider the possibility that the U.S. State Department or the executive branch of this Government is going to extradite someone in a trumped up political case with politicized overtones for the purpose of trying to embarrass, let us say, the Government of Israel or any other government. We clearly do not do that under our extradition treaties. We require probable cause. We screen for frivolous kinds of charges that have been brought and, in those cases, it is our law and our practice not to extradite. So, I think the answer is very clearly there is no such additional problem.

Let me also add that the way to look at this is to ask the question even if you held the views my colleague has just expressed, What is the particular incremental benefit to the United States by the Genocide Convention? We are already subject under customary international law, which is extremely vague, which does not have the benefit of the U.S. understanding, which does not have the benefit of the carefully drafted language in convention, to exactly that kind of politicized charge today. In my judgment, one of the substantial advantages of U.S. ratification is to try to pin down and control this sort of politicized charge made against the West.

Mr. DE SEIFE. From a practical viewpoint, I don't think there is too much to fear. I join Professor Moore.

On the other hand, from a theoretical viewpoint and certainly from a propaganda viewpoint, we are legitimizing a forum for individuals who should not even be heard and that is my problem. Thank you.

Mr. MURPHY. I believe there are two considerations—one of domestic law and one of international law and international relationships. As a matter of domestic law, as Professor Moore has pointed out, it is within the authority of the executive branch to refuse extradition, and the executive branch is going to refuse extradition in the kind of situation that Professor Friedlander has posed.

The next question is, if the executive branch refused extradition in the kinds of situations posed by Professor Friedlander, would this constitute a violation of the Genocide Convention? I think the answer to that question is clearly no, again for the reasons we have been discussing at some length here. The Convention lends precision to the definition of the crime of genocide, and would help depoliticize the question of genocide.

Mr. CHADWICK. This is the last question.

What if the United States ratified the Convention with a reservation stating the United States would only submit to the World Court jurisdiction when it agrees in advance?

Mr. FRIEDLANDER. That may be what we are talking about now in the wake of the Nicaraguan case. We do have the problem of the original accession and the phrasing of our reservations to that accession in August 1946, and particularly the Connally amendment which says the United States will not participate in questions that involve purely domestic matters within the United States. On this one, I will gladly also turn it over to my colleagues. I think we may be in the process of fashioning a new approach to the International Court of Justice as a result of our refusal to participate in the ongoing *Nicaragua v. United States* case and withdrawing for a period of 2 years. I am not quite sure where that leaves us with respect to the International Court, but I do think we should, one, have a reservation that says the Connally amendment applies to the Genocide Convention and article IX, as well as the regular ICJ statute.

Two, I also think we should have an amendment, or if you want to take the position of my colleagues, say understanding or clarification, that we will not appear before the International Court unless we agree to appear also on a voluntary basis. The Genocide Convention in article IX mandates compulsory jurisdiction, and I think under the situation that has been described here today, let alone what is developing with respect to the International Court in the world arena right now, I don't think absolute compulsory jurisdiction is a good idea.

Professor MOORE. The kind of reservation that the question asks is, as many may know, very similar to the Indian reservation which in essence says the parties to the dispute all have to have agreed before in fact there is jurisdiction to go to the Court. There are some problems with that. First, the Netherlands declaration which is that of one of our NATO allies that rejected the Soviet bloc kind of reservation to article IX, also rejected the Indian reservation as incompatible with the purposes of the Convention. The United Kingdom comment was to much the same effect as the

Netherlands comment in reacting to those 15 nations that have some kind of reservation to article IX, making much the same point. So the United States has no reservation along those lines or a Connally-type reservation to article IX, and two of our NATO allies have gone on record indicating they view the states that have those reservations as not in essence being legally party to the Genocide Convention.

In addition to that, it does place us somewhat in the camp of the Soviet bloc countries—9 of those 15 are Communist nations that have refused to accept the jurisdiction of the Court. Moreover, it seems to me it does not get around this problem that we would still be subject to the jurisdiction of the Court under the optional clause, except we would be subject to the jurisdiction of the Court without benefit of a carefully drafted definition of genocide and without benefit of the U.S. understanding.

Let me just say also that I think if the issue came down to one of whether there should be some kind of reservation to article IX or whether the Genocide Convention would receive Senate advice and consent, with that choice, my answer is you should go forward to Senate advice and consent even with a reservation, if necessary.

Having said that, I strongly believe and the more I have looked at the issue the more strongly I believe this to be the case that a reservation is not in the interest of the United States, and I say that as one who has experienced first hand the problems in the World Court.

Let me just add also if you did have a reservation, my own feeling is that that Indian type reservation is probably about as good as you can do. The Connally reservation is not a very useful approach. Those of us who were aware of the problems, we were not able to invoke the Connally reservation in the *Nicaraguan* case. It did not help the United States in that case where we desperately needed the Connally reservation, and where it was inappropriate for the Court to be taking this case. Yet, in previous cases, where we wanted to bring an action, it was invoked against us. We would endlessly be buying that type of relief against others.

Mr. DE SEIFE. I think that type of reservation nullifies the Convention, so what am I talking about? I am saying to you that if you can't in good conscience sign or ratify the Convention without reservations, do not sign this piece of paper.

Mr. CHADWICK. Thank you.

Professor Murphy.

Mr. MURPHY. I am opposed to this reservation which strikes me as particularly inappropriate and harmful. It would negate entirely the provisions of article IX of the Convention and bar the use of article IX by the United States to call states to account for violations of the Genocide Convention because the reservation could be cited against us under the principle of reciprocity. In other words the United States simply would not be able to use article IX of the Convention in the way we have been discussing up to this point.

Moreover, in my view, the reservation makes no sense, because states can always agree among themselves to bring a case before the International Court of Justice. The statute of the International Court of Justice provides in article XXXVI paragraph 1, that the jurisdiction of the Court comprises all cases which the parties refer

to it and all matters especially provided for in the United Nations charter and treaties in force. As presently worded, article IX of the Genocide Convention falls within the latter part of that language. It is language in a treaty in force that provides for the jurisdiction of the International Court of Justice. If the United States adopted the suggested reservation, that latter language would not be applicable. Rather, the firm part of article XXXVI paragraph 1, that the jurisdiction of the Court comprises all cases that the parties refer to it, would apply.

This would seriously undermine the possible effectiveness of the Court in implementing the Convention. It would be most unfortunate if such a reservation were adopted.

I will not speak to the question of the Connally amendment except to note it is not applicable to article IX of the Convention. In my opinion, the Connally amendment has created problems for the United States, but that is a subject for another time and another hearing.

Mr. CHADWICK. On behalf of Senator Hatch, I would like to thank each of you for the time you have put into the preparation of your testimony, opening statements and for being here today. The record will be kept open for 1 week in order to accommodate any additional material you might have.

It is my understanding the Foreign Affairs Committee will be holding a hearing shortly on the Genocide Convention.

This hearing is now adjourned.

[The committee was adjourned at 11:45 a.m.]

APPENDIX

CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE ¹

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizing that at all periods of history genocide has inflicted great losses on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided :

ARTICLE I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

ARTICLE II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

ARTICLE III

The following acts shall be punishable :

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

ARTICLE IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

ARTICLE V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

¹ . Certified copy

ARTICLE VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

ARTICLE VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

ARTICLE VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

ARTICLE IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

ARTICLE X

The present Convention, of which the Chinese, English, French, Russian, and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

ARTICLE XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

ARTICLE XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *procès-verbal* and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

ARTICLE XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

ARTICLE XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

ARTICLE XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

ARTICLE XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

- (a) Signatures, ratifications and accessions received in accordance with article XI;
- (b) Notifications received in accordance with article XII;
- (c) The date upon which the present Convention comes into force in accordance with article XIII;
- (d) Denunciations received in accordance with article XIV;
- (e) The abrogation of the Convention in accordance with article XV;
- (f) Notifications received in accordance with article XVI.

ARTICLE XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

ARTICLE XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

(Genocide Convention, hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 81-2, January 23, 24, 25, and February 9, 1950, pp. 6-8)

A. STATE OF MISSOURI BRIEF

**LANDMARK BRIEFS AND ARGUMENTS
OF THE SUPREME COURT
OF THE UNITED STATES:
CONSTITUTIONAL LAW**

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Volume 20

Eisner v. Macomber (1920)
Missouri v. Holland (1920)
Truax v. Corrigan (1921)

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 609

THE STATE OF MISSOURI, *Appellant*,

—vs.—

RAY P. HOLLAND, United States Game Warden, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF OF APPELLANT

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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 609.

THE STATE OF MISSOURI, Appellant,

vs.

RAY P. HOLLAND, United States Game Warden.

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF MISSOURI.

BRIEF OF APPELLANT.

STATEMENT.

This suit involves the constitutionality of the "Migratory Bird Treaty Act" and is an endeavor upon the part of the State of Missouri, appellant, to preserve intact its sovereignty and to retain unimpaired the powers reserved to it by the tenth amendment to the Federal Constitution.

The bill (Printed Abstract, pp. 2 to 4, inclusive) alleges the arrest and prosecution of citizens of Missouri and the threatened arrest and prosecution of other citizens by the United States Game Warden, for violations of the Migratory Bird Treaty Act, and seeks, on account of the unconstitutionality of such act, to enjoin such arrests and prosecutions and the enforcement of the act in any wise, upon the following grounds:

(a) That the arrests and prosecutions and threatened arrests and prosecutions by the Game Warden constitute an invasion of the sovereignty of the state of Missouri and a violation of the laws of Missouri upon the subject.

(b) That the enforcement of the Federal act constitutes an interference with the property right of the people, held in trust by the State, to the wild game within its borders.

(c) That the arrest and prosecution of citizens of Missouri for the exercise of lawful privileges conferred by the state prevented the discharge of the duty of the State to protect its citizens in the enjoyment of such privileges.

(d) That the destruction of the revenues of the State derived from hunters' licenses was threatened by the enforcement of the Federal act.

United States Game Warden Holland, by Mr. Francis M. Wilson, United States District Attorney, moved to dismiss for want of equity in the bill, which said motion (Printed Abstract, pp. 5 and 6) was sustained; and thereupon, complainant declining to plead further, judgment and decree dismissing the bill was entered.

The cause involving the construction and application of the Constitution of the United States and the constitutionality of a law of the United States and the validity and construction of a treaty made under the authority of the United States being drawn in question, appellant prosecutes its appeal from said judgment to this Court.

Subsequent to the enactment by Congress of the above Migratory Bird Treaty Act, to-wit: on the 31st day of July, 1918, the President of the United States issued his proclamation approving and proclaiming certain regulations made by the Secretary of Agriculture pursuant to the provisions of said above Migratory Bird Treaty Act. Under said regulations the open season in Missouri for waterfowl (except wood duck, eider ducks, and swans), coot, gallinules, and Wilson snipe and jacksnipe, *is fixed as from September 16th to December 31st.* (Post. page 16.)

The state of Missouri, by virtue of its trust right as sovereign and in the exercise of its reserved powers of police, has, in fact, since at least the year 1874 (Laws of Missouri,

1874, page 108), continuously asserted and exercised the absolute control of wild game within her own borders. Article II of Chapter 49, Revised Statutes of Missouri, 1909, and an act for the preservation of fish and game, approved March 24, 1915, Laws of Missouri, 1915, pages 289 to 296, inclusive, prohibits the taking of wild game, including the aforesaid waterfowls specified in said proclamation of the President of the United States, except by persons who have been granted permission or license for such purpose, and the taking of said wild game is prohibited during certain seasons of the year. Under the provisions aforesaid the taking, killing and using of the aforesaid waterfowls is permitted and *is lawful between the 15th day of September of each year and the 30th day of April of the following year.* (Post. page 13.)

It thus appears that the provisions of the federal law and the provisions of the laws of the state of Missouri, relating to the taking, killing and use of migratory game birds, are in direct conflict.

Appellant contended below, and contends here, that the authority of the state over wild game within its borders is paramount under either of two views:

First.—The *trust right* of the state, which in its sovereign capacity as the representative of and for the use and benefit of all its people in common, holds the title to all wild game within its borders, the ownership of such wild game being that of its people in their united sovereignty.

Second.—The police power of the state.

This contention of the power of the state over wild game within its borders necessarily draws in question the validity and construction of a treaty relating to migratory game birds, made between the United States of America and Great Britain on the 16th day of August, 1916, and proclaimed December 8th, 1916. (Post. page 5.)

It involves also the construction and application of the Constitution of the United States, particularly Article X of the amendments thereto, and the constitutionality of a law of the United States known as the "Migratory Bird Treaty Act," approved July 3rd, 1918, U. S. Compiled Statutes, 1918, page 1795. (Post. page 9.)

This is true because the treaty between the United States of America and Great Britain, and the Migratory Bird Treaty Act of Congress upon their face apparently assume and assert the paramount authority and power of the Federal Government over migratory game birds within the borders of any state of the United States of America; consequently, by necessary implication, they deny to the state of Missouri and to each of the several states of the Union the right of sovereignty and the possession of reserved power, in so far as such sovereignty and reserved power affect the taking, killing and use of wild game within the borders of such states.

The Honorable Arba S. Van Valkenburgh, Judge of the District Court, in his opinion filed in this case, said that the issues tendered by the pleadings present two questions:

(1) the validity of the law (Migratory Bird Treaty Act) standing by itself, as affecting the relative power of the Federal Government and of the states;

(2) the other, the status of the treaty (between the United States of America and Great Britain), to give effect to which the so-called Migratory Bird Treaty Act, was passed. (Printed abstract of record, page 8).

In this opinion the District Court held:

First, that upon authority and principle the Migratory Bird Treaty Act, in the absence of treaty, would be unconstitutional and invalid.

Second, that the Migratory Bird Treaty Act, being in aid of the treaty between the United States of America and Great Britain, became, by virtue of such treaty, constitutional and valid.

The latter holding, as applied to the internal affairs of a state, we believe involves a fundamental contradiction. Under the facts of the instant case, the appellant contends that, in its ultimate analysis, such holding leads directly to the elimination of all reserved and unsurrendered powers belonging to the several states of the Union. It annuls the tenth amendment to the Constitution of the United States and annihilates the idea that the Constitution reserves to the states any powers which the Federal Government under the guise of a treaty may not usurp.

The treaty between the United States of America and Great Britain, relating to migratory game birds, formal parts omitted, is as follows:

CONVENTION BETWEEN UNITED STATES
OF AMERICA AND GREAT BRITAIN.

"ARTICLE I.

The High Contracting Powers declare that the migratory birds included in the terms of this convention shall be as follows:

1. Migratory game birds:

(a) Anatidae, or waterfowl, including brant, wild ducks, geese and swans.

(b) Gruidae, or cranes, including little brown, sandhill, and whooping cranes.

(c) Rallidae, or rails, including coots, gallinules, and sora, and other rails.

(d) Limicolae, or shore birds, including avocets, curlew, dowitchers, godwits, knots, oyster catchers, phalaropes, plovers, sandpipers, snipe, stilts, surf birds, turnstones, willet, woodcock and yellowlegs.

(e) Columbidae, or pigeons, including doves and wild pigeons.

2. Migratory insectivorous birds: Bobolinks, catbirds, chickadees, cuckoos, flickers, flycatchers, grossbeaks, humming birds, kinglets, martins, meadowlarks, nighthawks or bullbats, nuthatches, orioles, robins, shrikes, swifts, tanagers, titmice, thrushes, vireos, swallows, warblers, waxwings, whippoorwills, woodpeckers, and wrens, and all other perching birds which feed entirely or chiefly on insects.

3. Other migratory nongame birds: Auks, auklets, bitterns, fulmars, gannets, grebes, guillemots, gulls, herons, jaegers, loons, murres, petrels, pullins, shearwaters and terns.

ARTICLE II.

The High Contracting Powers agree that, as an effective means of preserving migratory birds, there

shall be established the following close seasons during which no hunting shall be done except for scientific or propagation purposes under permits issued by proper authorities.

1. The close season on migratory game birds shall be between March 10 and September 1, except that the close season on the Limicolae, or shore birds, in the maritime Provinces of Canada and in those States of the United States bordering on the Atlantic Ocean which are situated wholly or in part north of Chesapeake Bay shall be between February 1 and August 15, and that Indians may take at any time scoters for food but not for sale. The season for hunting shall be further restricted to such period not exceeding three and one-half months as the High Contracting Powers may severally deem appropriate and define by law or regulation.

2. The close season on migratory insectivorous birds shall continue throughout the year.

3. The close season on other migratory non-game birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murre, and puffins, and their eggs, for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

ARTICLE III.

The High Contracting Powers agree that during the period of 10 years next following the going into effect of this convention there shall be a continuous close season on the following migratory game birds, to wit:

Band-tailed pigeons; little brown, sandhill and whooping cranes, swans, curlew and all shorebirds (except the black-breasted and golden plover, Wilson or jacksnipe, woodcock, and the greater and lesser yellowlegs); provided, that during such 10 years the close seasons on cranes, swans, and curlew in the Province of British Columbia shall be made by the

proper authorities of that Province within the general dates and limitations elsewhere prescribed in this convention for the respective groups to which these birds belong.

ARTICLE IV.

The High Contracting Powers agree that special protection shall be given the wood duck and the eider duck, either (1) by a close season extending over a period of at least five years, or (2) by the establishment of refuges, or (3) by such other regulations as may be deemed appropriate.

ARTICLE V.

The taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited except for scientific or propagating purposes, under such laws or regulations as the High Contracting Powers may severally deem appropriate.

ARTICLE VI.

The High Contracting Powers agree that the shipment or export of migratory birds or their eggs from any State or Province, during the continuance of the close season in such State or Province, shall be prohibited except for scientific or propagating purposes, and the international traffic in any birds or eggs at such time captured, killed, taken, or shipped at any time contrary to the laws of the State or Province in which the same were captured, killed, taken, or shipped shall be likewise prohibited. Every package containing migratory birds or any parts thereof or any eggs of migratory birds transported, or offered for transportation from the Dominion of Canada into the United States or from the United States into the Dominion of Canada, shall have the name and address of the shipper and an accurate statement of the contents clearly marked on the outside of such package.

ARTICLE VII.

Permits to kill any of the above-named birds which, under extraordinary conditions, may become seriously injurious to the agricultural or other interests in any particular community may be issued, by the proper authorities of the High Contracting Powers under suitable regulations prescribed therefor by them respectively, but such permits shall lapse, or may be canceled, at any time when, in the opinion of said authorities, the particular exigency has passed, and no birds killed under this article shall be shipped, sold, or offered for sale.

ARTICLE VIII.

The High Contracting Powers agree themselves to take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present convention.

ARTICLE IX.

The present convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as possible and the convention shall take effect on the date of the exchange of the ratifications. It shall remain in force for 15 years, and in the event of neither of the High Contracting Powers having giving notification, 12 months before the expiration of said period of 15 years, of its intention of terminating its operation, the convention shall continue to remain in force for one year and so on from year to year.

The Migratory Bird Treaty Act above referred to, approved July 3rd, 1918, U. S. Compiled Statutes of 1918, p. 1795, is as follows:

MIGRATORY BIRD TREATY ACT.

"AN ACT To give effect to the convention between the United States and Great Britain for the protection of migratory birds concluded at Washington, August sixteenth, nineteen hundred and sixteen, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known by the short title of the 'Migratory Bird Treaty Act.'

Sec. 2. That unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful to hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time or in any manner, any migratory bird, included in the terms of the convention between the United States and Great Britain for the protection of migratory birds concluded August sixteenth, nineteen hundred and sixteen, or any part, nest, or egg of any such birds.

Sec. 3. That subject to the provisions and in order to carry out the purposes of the convention, the Secretary of Agriculture is authorized and directed from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the convention to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regula-

tions permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

Sec. 4. That it shall be unlawful to ship, transport, or carry, by any means whatever, from one State, Territory, or District to or through another State, Territory, or District, or to or through a foreign country, any bird, or any part, nest, or egg thereof, captured, killed, taken, shipped, transported, or carried at any time contrary to the laws of the State, Territory, or District in which it was captured, killed, or taken, or from which it was shipped, transported, or carried. It shall be unlawful to import any bird, or any part, nest or egg thereof, captured, killed, taken, shipped, transported, or carried contrary to the laws of any Province of the Dominion of Canada in which the same was captured, killed, or taken, or from which it was shipped, transported, or carried.

Sec. 5. That any employee of the Department of Agriculture authorized by the Secretary of Agriculture to enforce the provisions of this act shall have power, without warrant to arrest any person committing a violation of this act in his presence or view and to take such person immediately for examination or trial before an officer or court of competent jurisdiction; shall have power to execute any warrant or other process issued by an officer or court of competent jurisdiction for the enforcement of the provisions of this act; and shall have authority, with a search warrant, to search any place. The several judges of the courts established under the laws of the United States, and United States Commissioners may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue warrants in all such cases. All birds, or parts, nests, or eggs thereof, captured, killed, taken, shipped, transported, carried or possessed

contrary to the provisions of this act or of any regulations made pursuant thereto shall, when found, be seized by any such employee, or by any marshal or deputy marshal, and upon conviction of the offender or upon judgment of a court of the United States that the same were captured, killed, taken, shipped, transported, carried, or possessed contrary to the provisions of this act, or of any regulation made pursuant thereto, shall be forfeited to the United States and disposed of as directed by the court having jurisdiction.

Sec. 6. That any person, association, partnership, or corporation who shall violate any of the provisions of said convention or of this act, or who shall violate or fail to comply with any regulation made pursuant to this act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$500 or be imprisoned not more than six months, or both.

Sec. 7. That nothing in this act shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said convention or of this act, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open season for such birds beyond the dates approved by the President in accordance with section three of this act.

Sec. 8. That until the adoption and approval, pursuant to section three of this act, of regulations dealing with migratory birds and their nests and eggs, such migratory birds and their nests and eggs as are intended and used exclusively for scientific or propagating purposes may be taken, captured, killed, possessed, sold, purchased, shipped, and transported for such scientific or propagating purposes if and to the extent not in conflict with the laws of the State, Territory, or District in which they are taken

captured, killed, possessed, sold, or purchased or in or from which they are shipped or transported if the packages containing the dead bodies or the nests or eggs of such birds when shipped and transported shall be marked on the outside thereof so as accurately and clearly to show the name and address of the shipper and the contents of the package.

Sec. 9. That the unexpended balances of any sums appropriated by the agricultural appropriation acts for the fiscal years nineteen hundred and seventeen and nineteen hundred and eighteen, for enforcing the provisions of the act approved March fourth, nineteen hundred and thirteen, relating to the protection of migratory game and insectivorous birds, are hereby reappropriated and made available until expended for the expenses of carrying into effect the provisions of this act and regulations made pursuant thereto, including the payment of such rent, and the employment of such persons and means, as the Secretary of Agriculture may deem necessary, in the District of Columbia and elsewhere, co-operation with local authorities in the protection of migratory birds, and necessary investigations connected therewith: *Provided*, That no person who is subject to the draft for service in the Army or Navy shall be exempted or excused from such service by reason of his employment under this act.

Sec. 10. That if any clause, sentence, paragraph, or part of this act shall for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Sec. 11. That all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 12. Nothing in this act shall be construed to prevent the breeding of migratory game birds on farms and preserves and the sale of birds so bred under proper regulations for the purpose of increasing the food supply.

Sec. 13. That this act shall become effective immediately upon its passage and approval."

MISSOURI LAWS.

The particular section of the game law of Missouri which is in direct conflict with the federal act and regulation, is as follows:

"No person shall take, capture or kill, by any means whatever, any game birds except the following named game birds between the following dates (both inclusive): Wild turkey—November 1st to December 31st of each year. Quail (bobwhite, partridge) and woodcock—November 10th to December 31st of each year. Ducks, geese, brant, snipe, black breasted and golden plover, greater and lesser yellowlegs, rails, coots and gallinules—*January 1st to April 30th and September 15th to December 31st of each year.* Doves—August 1st to November 10th of each year. Anyone who shall violate any of the provisions of this section shall, upon conviction thereof, be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than fifty dollars (\$50.00) for each offense, and an additional fine of five dollars (\$5.00) for each bird injured, killed or possessed."

Sec. 6516, p. 290, Laws of 1915.

The following sections are taken from Chapter 49, Revised Statutes of Missouri, 1909, creating a fish and game commission and providing for the preservation of fish and game:

"The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the state of Missouri, not now held by private

ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the state of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

Section 6508.

"Upon the payment of two dollars, unless otherwise provided, to the state game and fish commissioner, he is authorized to issue permits according to the provisions of this article."

Section 6572.

"It shall be unlawful for any person, after the passage of this article, to hunt in this state without first obtaining a license permitting him or her to do so. Such license shall be dated when issued, and shall authorize the person named therein to hunt during the calendar year of issue, and then subject only to the regulations and restrictions provided by law."

Section 6574.

"Any person who shall hunt in this state without being at the time of such hunting in possession of a license, as herein provided, duly issued to him (or her), which license shall cover the period in which he (or she) shall be hunting, or who shall furnish to another person a license issued to him (or her), shall be fined not less than twenty-five dollars nor

more than one hundred dollars and costs of prosecution."

Section 6581.

"All moneys sent to the state treasurer in payment of hunting licenses, other licenses, penalties and forfeitures shall be set aside by the state treasurer and shall constitute a fund known as the 'game protection fund,' for the payment of salary of the state game and fish commissioner and his necessary expenses; for the payment of deputy game and fish commissioners and their necessary expenses; also, the buying, shipping, keeping, propagating and preserving of game. . . ."

Section 6585.

REGULATIONS—MIGRATORY BIRD TREATY ACT.

To show the conflict between the regulations of the Migratory Bird Treaty Act as proclaimed by the President on July 31st, 1918, and the law of the state of Missouri relating to migratory birds, we quote the following taken from said proclamation:

"REGULATION 4.—OPEN SEASONS ON AND POSSESSION OF CERTAIN MIGRATORY GAME BIRDS.

"For the purpose of this regulation, each period of time herein prescribed as an open season shall be construed to include the first and last days thereof.

"Waterfowl (except wood duck, eider ducks, and swans), rails, coot, gallinules, black-bellied and golden plovers, greater and lesser yellowlegs, woodcock, Wilson snipe or jacksnipe, and mourning and white-winged doves may be taken each day from half an hour before sunrise to sunset during the open seasons prescribed therefor in this regulation, by the means and in the numbers permitted by Regulations 3 and 5 hereof, respectively, and when so taken, each species may be possessed any day during the respective open seasons herein prescribed therefor

and for an additional period of 10 days next succeeding said open season.

*"Waterfowl (except wood duck, eider ducks, and swans), coot, gallinules, and Wilson snipe or jack snipe.—*The open seasons for waterfowl (except wood duck, eider ducks, and swans), coot, gallinules and Wilson snipe or jacksnipe shall be as follows:

"In Maine, New Hampshire, Vermont, Massachusetts, New York (except Long Island), Pennsylvania, Ohio, West Virginia, Kentucky, Indiana, Michigan, Wisconsin, Illinois, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, Colorado, Wyoming, Montana, Idaho, Nevada, and that portion of Oregon and Washington lying east of the summit of the Cascade Mountains the open season shall be from September 16 to December 31;

* * * * *

(All italics in this brief may be treated by the court as ours.)

SPECIFICATION OF ERRORS.

(1) The court erred in holding that there was a want of equity in the bill of complaint, and in dismissing such bill of complaint.

(2) The court erred in holding the statute of the United States, described as the "Migratory Bird Treaty Act," approved July 3rd, 1918, constitutional.

(3) The court erred in holding that the convention between the United States and Great Britain, proclaimed to be effective December 8th, 1916, pursuant to which said Migratory Bird Treaty Act was enacted, did not invade powers and property rights reserved to the state of Missouri by the Constitution of the United States.

ARGUMENT.

FOREWORD.

Involving as this case does the right of the state of Missouri to maintain inviolate a trust which it holds for the benefit of all its people, and to maintain the right to exercise the power of police, an incident of state sovereignty and reserved to the States by the Constitution, it calls for a review of the form and the fundamentals of the Government designed by the Constitution of the United States.

Instinctively in a matter of this character we turn to "authorities." Original or novel arguments, were they possible, have little place in the determination of the constitutional powers of State and Federal governments at this late day.

We wish, not to create, but to revive an atmosphere: the atmosphere breathed by those who framed and those who ratified and first amended the Constitution of the United States. If the act of Congress now in question would have been unconstitutional then, it is unconstitutional now. The Constitution itself does not change.

"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. *Those things which are within its grants of power, as those grants were*

understood when made, are still within them, and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in Dred Scott v. Sandford, 19 How. 393, 426:

"It is not only the same in words, but the same in meaning, and delegates the same powers to the Government and reserves and secures the same rights and privileges to the citizens; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'"

South Carolina v. United States, 199 U. S. 447, 448,
50 L. Ed. 261.

I.

If an executive officer, federal or state, is committing, or is about to commit, acts unauthorized by or in violation of law, to the irreparable injury of the property rights of another, such action or threatened action is good ground for injunctive relief against such officer.

Philadelphia Company v. Stimpson, 223 U. S. 605,
619, 620;

Magruder v. Bell Fourche, 219 Fed. 72, 79;

Noble v. Railroad, 147 U. S. 165, 172;

School Magnetic Healing v. McAnnulty, 187 U. S.
94;

Dobbins v. Los Angeles, 195 U. S. 241;

Truax v. Raich, 239 U. S. 37;

Lane v. Watts, 234 U. S. 525, 540;

Davis v. Los Angeles, 189 U. S. 217;

Ex Parte Young, 209 U. S. 162;

United States v. Lee, 106 U. S. 196.

In a suit of the character of the one at bar, mere property rights and loss of revenue, however, are not the chief consideration. Rights are involved which may not be valued in money, but the infraction of which the state may insist shall be stopped. An adequate remedy can only be had in a suit by the state to enjoin such infraction.

State of Georgia v. Copper Co., 206 U. S. 230, 237;
State of Missouri v. State of Illinois, 180 U. S. 208;
State of Kansas v. State of Colorado, 185 U. S. 125;
Glenwood Light & Water Co. v. Power Co., 239
U. S. 121.

"Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice, it may insist that an infraction of them shall be stopped."

State of Georgia v. Copper Co., 206 U. S. 230.

"Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the state. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. Georgia v. Tennessee Copper Co. 206 U. S. 230, 51 L. ed. 1038, 27 Sup. Ct. Rep. 618."

State of Kansas v. State of Colorado, 185 U. S. 125.

"An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health

and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. * * * * *

"That suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

State of Missouri v. State of Illinois, 180 U. S. 208.

In the Court below it was urged that the application for injunction could not be maintained against the Federal Game Warden, because it was in effect a suit against the United States. We incline to the opinion that the Government will abandon such contention. The cases of *Hamilton, Collector of Internal Revenue, appellant, vs. Kentucky Distilleries & Warehouse Company, Dryfoos, et al., appellants, vs. Edwards, Collector of Internal Revenue, and Ruppert vs. Caffey, United States Attorney and McElligott, Acting and Deputy Collector of Internal Revenue*, involving the constitutionality of the War Time Prohibition Act, and recently decided by this Court, were all applications for injunctions against Federal officers. That this was a proper method to test the constitutionality of the statutes involved in those cases is evidenced by the fact that no discussion of the proposition appears in the opinion.

When the sovereign power of the State of Missouri is invaded it seems to us self-evident that the State in its own name is pre-eminently the party to preserve and defend that sovereignty. Can it be that in the circumstances the State of Missouri is impotent and must depend for the protection of its sovereign rights and powers upon the submission to arrest and prosecution by some private individual for a violation of the Migratory Bird Law? The time worn maxim that equity does not suffer a wrong to be without a remedy is applicable here. If the State of Missouri may not itself restrain an invasion of its sovereignty by the Federal Government, there exists no way in which it can defend—an unthinkable situation. To so protect itself it cannot go to war. Surely, it will be permitted to come to Court.

II.

Our government had no prototype in history. The Federal Government and the States are separate and distinct sovereignties. The one, within the sphere of its delegated powers is supreme; the other, within the sphere of its undelegated and reserved powers, is no less supreme. It was never intended that the states should be shorn of their sovereignty in internal affairs.

Declaration of Independence, last par.;
 Articles of Confederation, Art. II;
 Constitution of the United States, Arts. IX and X, Secs. 3 and 4;
 Collector v. Day, 11 Wal. 113-124, 20 L. Ed. 122;
 Lane County v. Oregon, 7 Wall. 71-76, 19 L. Ed. 101;
 Gordon v. United States, 117 U. S. 697-705;
 Martin v. Hunter, 1 Wheat. 325.
 Turner v. Williams, 194 U. S. 279-295, 48 L. Ed. 979;
 McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579;
 Willoughby, Constitution, Vol. I, p. 66;
 South Carolina v. United States, 199 U. S. 447.

"....., that these United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as FREE AND INDEPENDENT STATES, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which INDEPENDENT STATES may of right do."

Declaration of Independence, last par.

"Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is

not by this Confederation expressly delegated to the United States in Congress assembled."

Articles of Confederation, Art. II.

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained the people."

Constitution of the United States, Amendment IX.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Constitution of the United States, Amendment X.

"We pass, therefore, to the vital question in this case, and it is one of far-reaching significance. We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, pre-eminently of this—a duty oftentimes of great delicacy and difficulty."

South Carolina v. United States, 199 U. S. 447, 448, 50 L. Ed. 261.

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments. . . . The gov-

ernment of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

Collector v. Day, 11 Wall, 113, 124; 20 L. Ed. 122.

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

McCulloch v. Maryland, 4 Wheat. 316, 405; 4 L. Ed. 579.

"The latter doctrine, upon the contrary, would derive federal authority not from powers expressly granted, but from an abstraction, and would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State.

"There can be no question as to the constitutional unsoundness, as well as of the revolutionary character, of the theory thus advanced. To accept it would be at once to overturn the long line of decisions that have held the United States Government to be one of limited, enumerated powers."

Willoughby on the Constitution, Vol. I, p. 66.

"By the Tenth Amendment the powers not delegated to the United States nor prohibited by it to the States, are ~~re-~~

served to the States respectively or to the people. The reservation to the States respectively *can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument.* And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so."

Gordon v. United States, 117 U. S. 697, 705.

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the *necessary existence of the States and, within their proper spheres, the independent authority of the States, is distinctly recognized.* To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved."

Lane County v. Oregon, 7 Wall. 71, 76; 19 L. Ed. 101.

"While undoubtedly the United States as a nation has all the powers which inhere in any nation, Congress is not authorized in all things to act for the nation, and too little effect has been given to the Tenth Article of the Amendments to the Constitution, . . . The powers the people have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grant from them."

Turner v. Williams, 194 U. S. 279, 295-296; 48 L. Ed. 979.

" , it is perfectly clear that the *sovereign powers vested in the State governments, by their respective constitutions,*

remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

"These deductions do not rest upon general reasoning, plain and obvious as they seem to be. *They have been positively recognized by one of the articles in amendment of the Constitution, which declares, that 'powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'*"

"The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

Martin v. Hunter, 1 Wheat. 304, 325-326.

"...: for since the protection of the health, morals, etc., of a people is one of the essential duties of the State, it can neither by contract nor concession of any kind, whether for value or without, divest itself of this obligation. To do so would be to abdicate; to part with it would be State suicide; impossible under the decision in *Texas v. White* (7 Wall. 700; 19 L. Ed. 227) that declares our government to be '*an indestructible union composed of indestructible States;*' and which was reaffirmed in *Collector v. Day* (11 Wall. 125, 20 L. Ed. 122). '*Without them (the States), the general government itself would disappear from the family of nations.'*"

Tucker, Limitations on the Treaty-making Power,
p. 297.

"...: and further, that being an original and reserved power, and the judicial officers appointed under it being a means of instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government, stand upon as solid ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins v. The Commissioners of Erie* from taxation by the State; *for in this respect,*

that is, in respect to the reserved powers, the State is as sovereign and independent as the general government."

Collector v. Day, 11 Wall. 125, 126; 20 L. Ed. 122.

III.

Under the ancient law, feudal law, and the common law in England the absolute control of wild game was an attribute of government and a necessary incident of sovereignty. When, therefore, the United Colonies became "FREE AND INDEPENDENT STATES" with full power to do all "acts and things which INDEPENDENT STATES may of right do," the power to control the taking of wild game passed to the States.

Geer v. Connecticut, 161 U. S. 519, l. c. 523-530;
Ward v. Race Horse, 163 U. S. 504.

"The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.

"Undoubtedly this attribute of government to control the taking of animals *ferae naturae*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country."

Geer v. Connecticut, *supra*, l. c. 527-8.

"The power of a state to control and regulate the taking of game cannot be questioned."

Ward v. Race Horse, 163 U. S. 504, l. c. 507.

"The argument, now advanced, in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become subject to state authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign state,

a necessary incident of whose authority was the complete power to regulate the killing of game within its borders."

Ward v. Race Horse, 163 U. S. 504, l. c. 510.

It would seem that if the states are to be shorn of their control over wild game within their respective borders, they are to be *less* than was intended by the Constitution when ratified by the people. *If it had even been suggested that, although Congress had no power to control the taking of wild game within the borders of any state, yet indirectly by means of a treaty with some foreign power it could acquire the power and by this means its long arm could reach into the states and take food from the tables of their people, who can for one moment believe that such a Constitution would have been ratified?*

Wild game and the right of the people thereto has always been a "touchy" subject with all English speaking people. It was of sufficient importance to be a part of the *Magna Charta* and the "Charter of the Forests." (See Parker v. People, 111 Ill., 581, l. c. 647.)

IV.

Missouri, upon her admission to the Union, became entitled to and possessed of *all the rights and dominion and sovereignty* which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. Equality of constitutional right and power is the condition of all the states of the Union, old and new.

Escanaba v. Chicago, 107 U. S. 678, 688;
 Ward v. Race Horse, 163 U. S. 504, 513;
 Cardwell v. Bridge Co., 113 U. S. 205, 212;
 Willamette, Oregon, v. Hatch, 125 U. S. 1;
 Pollard v. Hagan, 3 How. 212;
 Withers v. Buckley, 61 U. S. 84, 92;
 Permol v. Municipality, 44 U. S. 589.

"The power of all the states to regulate the killing of game within their border *will not be gainsaid*, yet, if the treaty applies to the unoccupied land of the United States in the state

of Wyoming, that state would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the state. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other states of the Union, *a power resulting from the fact of statehood and incident to its plenary existence.*"

Ward v. Race Horse, 163 U. S. 504, l. c. 514.

"On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original States *in all respects whatever.*' 3 Stat. 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new."

Escanaba v. Chicago, 107 U. S. 678, 688.

"When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the secession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; *because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.*

Pollard's Lessee v. Hagan, 3 How. 212, 223.

V.

This power of the state over wild game within its borders, which "cannot be questioned" and "will not be gainsaid," is derived from the peculiar nature of such property and its common ownership by all the citizens of the state in their collective sovereign capacity. The state in its sovereign capacity is the representative of the people in their common ownership of the wild game within the borders of the state, and *holds the same in trust for the benefit of all its people.*

- Geer v. Connecticut, 161 U. S. 519, l. c. 529, 530;
 McCready v. Virginia, 94 U. S. 391;
 Martin v. Waddell, 16 Pet. 410;
 United States v. Shauver, 214 Fed. 154;
 United States v. M'Cullagh, 221 Fed. 288, 294;
 Rupert v. United States, 181 Fed. 87, 90;
 Magner v. People, 97 Ill. 320, 333;
 Gentile v. State, 29 Ind. 409, 417;
 Ex Parte Maier, 103 Cal. 476, 483;
 Chambers v. Church, 14 R. I. 398, 400;
 Manchester v. Massachusetts, 139 U. S. 240;
 Patsone v. Pennsylvania, 232 U. S. 138;
 Abby Dodge v. United States, 223 U. S. 166;
 Smith v. Maryland, 18 How. 71, 15 L. Ed. 270;
 Carey v. South Dakota, U. S. Sup. Ct. 346, May
 Term, 1919;
 Silz v. Hesterberg, 211 U. S. 31;
 In re Deininger, 108 Fed. 623;
 Heim v. McCall, 239 U. S. 175.

"Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people.

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" The proposition that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot *allow its own people the enjoyment of the benefits of the property belonging to them in common*, without at the same time permitting the citizens of other states to participate in that *which they do not own*. In view of the authority of the State to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the state, it may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state. *The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose.*"

Geer v. Connecticut, 161 U. S. 519, l. c. 529-530.

"In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the People in their united sovereignty. *Martin v. Waddell*, 16 Pet., 410. Such an appropriation is, in effect, nothing more than a regulation of the use by the People of their common property. The right which the People of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. *It is, in fact, a property right*, and not a mere privilege or immunity of citizenship."

McCready v. Virginia, 94 U. S. 391, l. c. 394; 24 L. Ed. 248.

"Are migratory birds, when in a state on their usual migration, the property of the United States or of the states where they are found? If they are the property of the nation the states would have no power to regulate, control or prohibit the hunting or killing of them. But the rule of law which all the American Courts have recognized is that animals *ferae*

naturae, denominated as game, are owned by the states, not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common. This principle has not only been maintained by all the highest courts of the states in which the question has arisen, but has had the approval of the Supreme Court of the United States in every case which has come before it."

United States v. Shauver, 214 Fed. 156, 157.

"It is to be remembered that the subject of this whole discussion is *wild game*, which the state may preserve for its own citizens if it pleases.

Patsone v. Pennsylvania, 232 U. S. 138, l. c. 145, 146; 58 L. Ed. 544.

"While it is true that it would be possible to interpret the statute as applying to sponges taken in local waters, it is equally certain that it is susceptible of being confined to sponges taken outside of such waters. In view of the clear distinction between state and national power on the subject, long settled as the time the act was passed, and the rule of construction just stated, we are of opinion that *its provisions must be construed as alone applicable to the subject within the authority of Congress to regulate*, and, therefore, be held not to embrace that which was not within such power."

The Abby Dodge v. United States, 223 U. S. 166, l. c. 175; 56 L. Ed. 393.

The fact that the State holds the wild game *in trust* for its people would seem to put it beyond the reach of Congress whether it (Congress) acted alone and directly or in conjunction with some foreign power and *indirectly*. If Congress alone cannot take over such *trust* from the State, how can it exercise such trust by means of a convention with some foreign power? If this trust may be destroyed by the treaty-making power, is there any trust which is inviolate?

VI.

But the power of the state over wild game within its borders is not dependent solely upon the authority which

the state derives from common ownership and the trust for the benefit of the people; the power of the state to control wild game is a necessary incident of the power of police. The power of police is an attribute of state sovereignty.

Geer v. Connecticut, 161 U. S. 519, 534;
City v. Miln, 11 Peters, 102, 132-133;
Pierce v. State, 13 N. H. 536, 576 et seq.;
Cutler v. Dibble, 21 How. 366;
Federalist, No. XLV (Hallowell, 1852), pp. 215-216;
Compagnie v. Board, 186 U. S. 380;
Groves v. Slaughter, 15 Pet. 449, 511;
Prigg v. Commonwealth, 15 Pet. 539, 625;
Commonwealth v. Alger, 7 Cush. 53, 84;
Thorpe v. Rutland, 27 Vt. 140, 149;
Beer v. Massachusetts, 97 U. S. 25, 33;
Rupert v. U. S., 181 Fed. 87, 90;
Cook v. Marshall, 196 U. S. 261;
In re Rahrer, 140 U. S. 545;
House v. Mayes, 219 U. S. 270, 281, 282;
Broadnax v. Missouri, 219 U. S. 292, 293;
People v. Becker, 241 U. S. 556;
Cantini v. Tillman, 54 Fed. 969;
Plumley v. Massachusetts, 155 U. S. 461, 473.

"In the American Constitution system, the power to establish the ordinary regulations of police has been left with the individual states, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress."

Cooley, *Constitutional Limitations* (7 Ed.), p. 831.

"The law of each state 'is the source of all of those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implications.' "

Smith v. Alabama, 124 U. S. 476.

"State power to promote public health, good order and prosperity 'is a power originally and always belonging to the states, not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, and essentially exclusive.' "

In re Rahrer, 140 U. S. 554.

"But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people."

Escanaba v. Chicago, 107 U. S. 678, 683, quoted in Ward v. Race Horse, 163 U. S. 504, l. c. 513.

"The absolute ownership of wild game is vested in the people of the state, and the Legislature, as the representative of the people, may grant to individuals the right to hunt and kill game at such times and upon such terms and under such restrictions, as it may see proper, or prohibit it altogether, as the Legislature may deem best. *The regulation of such a matter falls within the police power of the State.*"

State v. Heger, 194 Mo. 707.

"The power of the state police, so far as it relates to those matters which have been the subjects of foreign commerce, or of commerce among the states, acts upon them generally after the transit has been accomplished. When the particular trade between another nation and this country, or between different states, is ended, and the property which formed the subject of it, from being property in one government, and then *in transitu*, has, by that commerce and change of place become part and parcel of the mass of property in a particular state, released from the charges of the national government, and from its superintendence, that property can claim no exemption from the operation of the laws of the state where it is situate, regulating its safe-keeping, sale and use—those laws being general laws, affecting other property of a like character in a similar manner; and being in good faith, but parts of the internal police of the state where it is situated,

and not, in effect, regulations of the commerce which brought it there. The fact that the article had been transported from another nation, or state, and that it had before that time been the subject-matter of commerce between two countries, or states, cannot, after such change is perfected, confer upon it, in respect to the operation of state police, any character different from that possessed by other component parts of the general mass of property there."

Pierce v. State, 13 N. H. 536, 1. c. 579.

" Police, relates only to the internal concerns of one state, and commerce, within it, is purely a matter of internal regulation, when confined to those articles which have become so distributed as to form items in the common mass of property. It follows, that any regulation which affects the commercial intercourse between any two or more states, referring solely thereto, is within the powers granted exclusively to Congress; and that those regulations which affect only the commerce carried on within one state, or which refer only to subjects of internal police, are within the powers reserved."

Groves v. Slaughter, 15 Peters, 449, 511.

"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.

"Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. 'This,' said this court in *United States v. Dewitt*, 9 Wall. 41, 45, 19 L. Ed. 593, 'has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.' See *Keller v. United States*, 213 U. S. 138, 144, 145, 146, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066; *Cooley's Constitutional Limitations* (7th Ed.), p. 11.

"In the judgment which established the broad power of Congress over interstate commerce, Chief Justice Marshall said (9 Wheat. 203, 6 L. Ed. 23):

" 'They (inspection laws) act upon the subject, before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.'

* * * * *

" The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.

"In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101. The power of the states to regulate their purely internal affairs by such laws as seem wise to local authority is inherent and has never been surrendered to the general government. *New York v. Miln*, 11 Pet. 102, 139, 9 L. Ed. 648; *Slaughter House cases*, 16 Wall. 36, 63, 21 L. Ed. 394; *Kidd v. Pearson*, *supra*."

Hammer v. Dagenhart, 247 U. S. 251 (38 Sup. Ct. Rep. 529.)

"As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legis-

lation, as, for example, in the District of Columbia. *Within state limits, it can have no constitutional operation.* This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions (License cases, 5 How. 504; Passenger cases, 7 How. 283); License Tax cases, 5 Wall. 47 (720 U. S. XVIII, 500, and the cases cited) that we think it unnecessary to enter again upon the discussion."

U. S. v. Dewitt, 9 Wall. 41 (19 L. Ed. 593.)

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

Beer Co. v. Massachusetts, 97 U. S. 32, 33; 24 L. Ed. 989.

"All the rights and powers which the states possessed before the adoption of that constitution, they still retain, and may exercise, unless they are taken away, limited, or modified by it. The language of the tenth article of the amendments is express: 'The powers not delegated to the United States by the constitution, not prohibited by it to the states, are reserved to the states respectively, or to the people.' *It is very clear that the power of regulating the internal trade, and matters of police, of the several states, is not granted to the United States, nor prohibited to the states.*"

Pierce v. The State, 13 N. H. 536, l. c. 572.

" . . . the police power, power vested in the legislature by the Constitution, to make, or ordain or establish

all manner of wholesome and reasonable laws, statutes and ordiances, either with penalties, or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.

"It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise."

Commonwealth v. Alger, 7 Cushing 85.

"There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, *of the perfect right, in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.*"

Thorpe v. Rutland, 27 Vt. 140.

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: *That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the Constitution of the United States.* That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. *That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.*

City of New York v. Miln, 11 Peters, 139, 9 L. Ed. 648.

"The police power belonging to the States in virtue of their general sovereignty, 'extends over all subjects within the territorial limits of the States; and has never been conceded to the United States.' "

Prigg v. Pennsylvania, 16 Peters, 625, 10 L. Ed. 1060.

"They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: *all which can be most advantageously exercised by the States themselves.* Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation."

Gibbons v. Ogden, 9 Wheat, 1, 203, 6 L. Ed. 23.

"Whenever internal police is the object, the power is excepted from every grant, and reserved to the States."

Holmes v. Jennison, 14 Pet. 614, 619; 10 L. Ed. 579.

"It has been frequently decided by this Court, 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, *are not surrendered by the States, or restrained by the Constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive.*' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health and morals, must come within this category."

License Cases, 5 How. 504, 631, 12 L. Ed. 256.

"For if the people of the several States of this Union reserved to themselves (as he elsewhere holds they did) the

power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, *would be an usurpation of power which this court could neither recognize nor enforce.*"

Passenger Cases, 7 How. 466, 12 L. Ed. 779.

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, *is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive.*"

In re Rahrer, 140 U. S. 554, 35 L. Ed. 572; 11 S. C. 65.

"The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulations of commerce; and yet no one doubts the local power. It is a power essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he is assailed by an assassin, or approached by poison."

Thurlow v. The Commonwealth of Massachusetts, 5 How. 504, 589; 12 L. Ed. 256.

" ; That such power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government; that among the powers of the State, not surrendered—which power therefore remains with the State—

is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good;"

House v. Mayes, 219 U. S. 282, 55 L. Ed. 213.

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia. *Within State limits, it can have no constitutional operation.* This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."

United States v. DeWitt, 9 Wall. 41; 19 L. Ed. 593.

If a source of food supply is not within the exclusive control of a state under its power of police, is there anything which is within the exclusive control of the police power of a state? If Congress by means of a treaty can tell the people of a state when and under what conditions they may eat wild game *which they own* in their collective sovereign capacity, and in and over which, while within the borders of the state, neither Congress nor any foreign nation can have, either under national or international law (see Behring Sea Arbitration, 32 Amer. Law Reg. 901), any property rights nor any power of control, then the Xth Amendment with its powers "reserved" to the states respectively or to the people, is a delusion, and they are states *in name only*, and our government a *very different government from that presupposed and intended by the people who ratified the Constitution.*

"If this extraordinary proposition can be taken as universally or as generally true, . . . the Constitution of the United States, with all its limitations on Federal power, and as it has been heretofore generally understood to be a special delegation of power, is a falsehood or an absurdity. It must be viewed as the creation of a power transcending that which called it into existence; a power single, universal, engrossing,

absolute. *Everything in the nature of civil or political rights is thus engulfed in federal legislation, and in the power of negotiating treaties."*

Passenger Cases, 7 Howard, p. 474; 12 L. Ed. 702.

VII.

Upon the authority and principles of the cases hereinbefore cited it has been held that a prior act of Congress, approved March 4, 1913—which act is similar to the one now in question, save that it was not made in aid of any treaty—was unconstitutional and void.

United States v. Shauver, 214 Fed. 154;

United States v. McCullagh, 221 Fed. 288.

"The act challenged is believed to be the single instance in the entire legislative or judicial history of this nation, or the composing states, in which a contrary view has been expressed. Unless a departure, as radical in theory as it is important in its effects, is to be made from fundamental principles long established by our laws, and long acquiesced in by our people, the act in question must be held incapable of support by any provision of the organic law of our country. If the act in question shall, on any ground, or for any reason, be upheld and enforced, it must surely follow that many laws of the separate states of this Union must hereafter be held inoperative, for there can be no divided authority of the nation and the several states over the single subject-matter in issue, with either safety to the nation or security to the citizen."

United States v. McCullagh, 221 Fed. 288, l. c. 294-295.

".....If Congress has not the power, the duty of the court is to declare the act void. *The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional."*

United States v. Shauver, 214 Fed. 154, 160.

VIII.

The fact that the present Act of Congress purports to give effect to a treaty between the United States and Great Britain cannot validate such Act of Congress when its effect is not only to accomplish that which under the Constitution Congress has no power to do, but also to do that which is forbidden to the entire Federal Government in all or any of its departments under the terms of the Constitution. Any and every treaty must be presumed to be made subject to the rightful powers of the governments concerned, and neither the treaty-making power alone, nor the treaty-making power in conjunction with any or all other departments of the Government, can bind the Government to do that which the Constitution forbids.

The Federalist, pp. 144-145, 215-216;

Works of Calhoun, Vol. I, 203-204, pp. 249-250, 252-253;

Geofroy v. Riggs, 133 U. S. 258, 267;

People v. Gerke, 5 Cal. 381, 382 et seq.;

Tucker on the Constitution, Vol. II, pp. 725, 726;

George v. Pierce, 148 N. Y. Supp. 230, 237;

Compagnie v. Board, 51 La. Ann. 645, 662; 186 U. S. 380;

Cantini v. Tillman, 54 Fed. 969;

Butler, Treaty Making Power, Vol. I, p. 64;

Loan Association v. Topeka, 20 Wall. 655, 662-663;

Story, Commentaries on the Constitution, Sec. 1508;

Duer, Lectures on the Constitutional Jurisprudence of the United States (2 Ed.), p. 228;

Colley, Principles of Constitutional Law, p. 117;

Von Holst, Constitutional Law of the United States, p. 202;

Thayer, Cases on Constitutional Law, Vol. I, p. 373;

59th Congress, 41 Congressional Record, Part I, p. 299;

William Archer Cocke's "Constitutional History of the United States," p. 235;
 Jefferson, Manual of Parliamentary Practice, p. 110, note 3;
 Elliot's Debates, Vol. III, pp. 504, 507;
 Cherokee Tobacco Case, 11 Wall. 616, 20 L. Ed. 227;
 Siemessen v. Bofer, 6 Cal. Rep., p. 250;
 The People v. Naglee, 1 Cal. 246, 247;
 8 Opinions of Attorney-Generals, 411-415;
 Constitution of United States, Amendment X;
 Kansas v. Colorado, 206 U. S. 1. c. 80;
 Murphy v. Ramsay, 114 U. S. 15, 44;
 Head Money Cases, 112 U. S. 580;
 Jones v. Meehan, 175 U. S. 132;
 Fong Yue Ting, 149 U. S. 698;
 Butler on Treaties, Vol. II, pp. 350, 352;
 Seneca Nation v. Christie, 126 N. Y. 122;
 Fort Leavenworth v. Lowe, 114 U. S. 525;
 Pierce v. State, 13 N. H. 576;
 Cooley, Constitutional Limitations (7 Ed.), p. 11;
 Martin v. Hunter's Lessee, 1 Wheat. 304, 326;
 Mormon Church v. United States, 136 U. S. 1;

"A treaty cannot be made which alters the Constitution of the country, or which infringes any express exceptions to the power of the Constitution of the United States."

Hamilton's Works, Vol. IV, p. 342.

"If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government; which is only another word for political power and supremacy. But it will not follow from this doctrine, that acts of the larger

society, which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These *will be merely acts of usurpation, and will deserve to be treated as such.*"

Alexander Hamilton, *The Federalist*, p. 145.

"It is sufficient, in reply, to state, that the clause is declaratory; that it vests no new power whatever in the government, or in any of its departments. Without it, the constitution and the laws made in pursuance of it, and the treaties made under its authority, would have been the supreme law of the land, as fully and perfectly as they now are; and the judges in every State would have been bound thereby, anything in the constitution or laws of a state to the contrary notwithstanding. Their supremacy results from the nature of the relation between the federal government, and those of the several States, and their respective constitutions and laws. Where two or more States form a common constitution and government, the authority of these, within the limits of the delegated powers, must, of necessity, be supreme, in reference to their respective separate constitutions and governments. Without this, there would be neither a common constitution and government, nor even a confederacy. The whole would be, in fact, a mere nullity. *But this supremacy is not an absolute supremacy. It is limited in extent and degree. It does not extend beyond the delegated powers;—all others being reserved to the states and the people of the States. Beyond these the Constitution is as destitute of authority, and as powerless as a blank piece of paper; and the measures of the government mere acts of assumption.* And, hence, the supremacy of laws and treaties is expressly restricted to such as are made in pursuance of the Constitution, or under the authority of the United States; which, can, in no case, extend beyond the delegated powers. There is, indeed, no power of the government without restriction; not even that which is called the discretionary power of Congress. I refer to the grant which authorizes it to pass laws to carry into effect the powers expressly vested in it,—or in the government of the United States,—or in any of its departments, or officers. This power,

comprehensive as it is, is, nevertheless, subject to two important restrictions; one, that the law must be necessary,— and the other, that it must be proper.”

Works of Calhoun, pp. 252-253.

“The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority, (which indeed cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any state; would it not be evident, that in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the state? Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a state; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which the Constitution plainly supposes to exist in the state governments? If there ever should be a doubt on this head, the credit of it will be entirely due to those reasoners, who in the impudent zeal of their animosity to the plan of the convention, have labored to envelope it in a cloud, calculated to obscure the plainest and simplest truths.”

Alexander Hamilton, *The Federalist*, pp. 144-145.

“The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the state.”

Mr. Madison, *The Federalist*, pp. 215-216.

“That her object was to guard against the abuse of construction, the act itself, on its face, and the discussions in her

convention, abundantly prove. It was done effectually, as far as it depended on words. It declares that all powers granted by the Constitution, are derived from the people of the United States; and may be *resumed* by them when *perverted* to their injury or oppression; and, that every power *not granted*, remains with them, and at their will; and that no right of any description can be canceled, abridged, restrained or modified by Congress, the Senate, the House of Representatives, the President, or any department, or officer of the United States. Language cannot be stronger. It guards the reserved powers against the government as a whole, and against all its departments and officers and in every mode by which they might be impaired; showing, clearly, that the intention was to place the reserved powers beyond the possible interference and control of the government of the United States." Works of Calhoun, pp. 249-250.

"The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the Government, or of its department, and *those arising from the nature of the Government itself and of that of the states*. It would not be contended that it extends so far as to authorize what the Constitution forbids or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter without its consent."

Geofroy v. Riggs, 133 U. S. 258, 267.

"The language which grants the power to make treaties, contains no words of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the Federal Government would be ineffectual, and *the reserved rights of the state would be subverted*. This principle of construction as applied, not only in reference to the Constitution of the United States, but particularly in the relation of all the rest of it to the treaty making grant, was recognized both by Mr. Jefferson and John Adams,—two leaders of opposite schools

of construction. Jefferson's Works, Vol. 3, page 135; Vol. 6, page 560."

People v. Gerke, 5 Cal. 381, 382 et seq.

"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do.

Tucker on the Constitution, Vol. II, p. 726.

"But if this treaty was an attempt to transfer from the people of the state to the people of the United States the fee and the right of pre-emption of the Onondago lands it would be in so far ineffective. A reasonable construction must be given to the Constitution, having regard to the circumstances under which it was formed and its purposes. The authority of the United States as to treaties is not unlimited. *It may not, under the guise of a treaty, deprive a state of those governmental powers which are a part of its inherent rights. It may not transfer its property.* *Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; *Provost v. Greenaux*, 19 How. 1, 15 L. Ed. 572; *Seneca Nation v. Christie*, 126 N. Y. 122-143, 27 N. E. 275."

George v. Pierce, 148 N. Y. Supp. 230, 237.

"The treaties and laws of the United States must be held to have been passed with reference to and subsidiary to, the rightful exercise of the police power by the different states, in aid of the protection and preservation of the public health within their respective borders."

Campagnie v. Board, 51 La. Ann., 645, 662, Affirmed; 186 U. S. 380.

"The police power is a right reserved by the states, and has not been delegated to the general government. In its lawful exercise, the states are absolutely sovereign. Such exercise cannot be affected by any treaty stipulations."

Cantini v. Tillman, 54 Fed. 969.

"Undoubtedly, as the Supreme Court asserted in *Murphy v. Ramsey*, 114 U. S. 15, complete and unlimited power is repugnant to our institutions, but it is also declared in *Mormon Church v. U. S.* 136 U. S. 1, that those limitations in many instances are found, not in the Constitution, but in the fundamental principles upon which our Government is established."

Butler, *Treaty Making Power*, Vol. I. p. 64.

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Loan Association v. Topeka, 20 Wall. 655, 662-663.

"The power 'to make treaties' is by the Constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliances or succors; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other. *But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the state. A power given by the Constitution can not be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the Government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would*

destroy what it was designed merely to fulfill, the will of the people."

Story, Commentaries on the Constitution, Sec. 1508.

"And although the President and Senate are thus invested with this high and exclusive control over all those subjects of negotiation with foreign powers, which, in their consequence, may affect important domestic interests, yet it would have been impossible to have defined a power of this nature, and, therefore, general terms only were used. These general expressions, however, ought strictly to be confined to their legitimate signification; and in order to ascertain whether the execution of the treaty-making power can be supported in any given case, those principles of the Constitution, from which the power proceeds, should carefully be applied to it. The power must, indeed, be construed in subordination to the Constitution; and however, in its operation, it may qualify, it cannot supersede or interfere with any other of its fundamental provisions, nor can it ever be so interpreted as to destroy other powers granted by that instrument. A treaty to change the organization of the Government, or annihilate its sovereignty, or overturn its republican form, or to deprive it of any of its constitutional powers, would be void; because it would defeat the will of the people, which it was designed to fulfill."

Duer, Lectures on the Constitutional Jurisprudence of the United States (2nd Ed.), p. 228.

"The Constitution imposes no restrictions upon this power (treaty-making power), but it is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the government or any of the states of its constitutional authority."

Cooley, Principles of Constitutional Law, p. 117.

"As to the extent of the treaty-power the Constitution says nothing, but it evidently cannot be unlimited. The power exists only under the Constitution, and every treaty

stipulation inconsistent with a provision of the constitution is therefore inadmissible and according to the constitutional law *ipso facto* null and void."

Von Holst, Constitutional Law of the United States, p. 202.

"It is certain that no authority granted by the constitution to any of the factors of government can be withdrawn from it by treaty. For that would be a change of the constitution and, as such, unconstitutional."

Von Holst, Constitutional Law of the United States, p. 202.

"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. We suggest a further limitation: A treaty cannot compel any department of the Government to do what the Constitution submits to its exclusive and absolute will. On these questions the true canon of construction, that the treaty-making power, in its seeming absoluteness and unconditional extent, is confronted with equally absolute and unconditioned authority vested in the judiciary."

Tucker, Constitution, Vol. II, p. 725.

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 541."

Thayer, Cases on Constitutional Law, Vol. I, p. 373.

"I plant myself firmly and unalterably upon the proposition that we can make no treaty that violates any of the provisions of the Constitution of the United States, that the treaty-making power in the sixth Article must be construed *in pari materia* with all the other provisions contained in the Constitution, and if the treaty comes in conflict with any of the limitations of the instrument the treaty must yield and the Constitution prevail.

"As a corollary of this proposition I plant myself upon the doctrine that any treaty that violates Article X of the Constitution and infringes upon the reserved rights of the States which have not been delegated to the General Government, and embraces subjects that belong to the States, and that are not necessary to carry out the purposes of the Government as defined in the Constitution, is *ultra vires* and not within the capacity of the Government to make."

Senator Rayner, 59th Congress, 41 Congressional Record, Part 1, p. 299.

"I do not say that there is no check or restriction upon the functions of the Government, for there is this limit, that it cannot be exercised in the destruction of or in opposition to any known Constitutional right or power, and must be subordinate to every other right recognized."

William Archer Cocke's "Constitutional History of the United States," p. 235.

"*It must have meant to except out of these the rights reserved to the states, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way.*"

Jefferson, Manual of Parliamentary Practice, p. 110, note 3.

"The honorable gentleman says that, if you place treaties on the same footing here as they are in England, he will consent to the power, because the king is restrained in making treaties. Will not the President and Senate be restrained? Being creatures of that Constitution, can they destroy it? Can

any particular body, instituted for a particular purpose, destroy the existence of the society for whose benefit it is created? It is said there is no limitation of treaties. I defy the wisdom of that gentleman to show how they ought to be limited. When the Constitution marks out the powers to be exercised by particular departments, I say no innovation can take place. An honorable gentleman says that this is the Great Charter of America. If so, will not the last clause of the 4th Article of the Constitution secure against dismembership? It provides that 'nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.' And if this did not constitute security, it follows, from the nature of civil association, that no particular part shall sacrifice the whole.

Governor Randolph in Virginia Convention.
Elliott's Debates, Vol. III, p. 504.

"The worthy Member says that they can make a treaty relinquishing our rights and inflicting punishments; because all the treaties are declared paramount to the constitutions and laws of the States. An attentive consideration of this will show the committee that they can do no such thing. The provision of the 6th article is, that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land. They can, by this, make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers. The treaties they make must be under the authority of the United States, to be within their province. It is sufficiently secured, because it only declares that, in pursuance of the powers given, they shall be the supreme law of the land, notwithstanding anything in the constitution or laws of the particular states."

George Nicholas in Virginia Convention.
Elliott's Debates, Vol. III, p. 507.

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instru-

ment. This results from the nature and fundamental principles of our government."

Cherokee Tobacco Case, 11 Wall. 616, 20 L. Ed. 227.

"In my opinion, the treaty-making power can only be coeval with the express grant of power to the Federal Government, and can never be extended, by implication, to the reserved powers of the States, or matters which belong to State sovereignty, or the right which appertains to each State to govern her own domestic concerns, and establish her own police regulations; neither can the exercise of this power, on the part of the President and Senate, be extended to matters which are the proper subject of congressional legislation; 'for it would,' as Mr. Jefferson truly remarks in his letter to Mr. Monroe, in 1796, upon the subject of the British treaty, 'be virtually transferring the powers of legislation from the President, Senate and House of Representatives to the President, Senate and Piamingo, and any other Indian, Algerine or other chief.'"

Siemssen v. Bofer, 6 Cal. Rep., p. 250.

"But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the state law give way. The question in such case would not be solely what is provided for by the treaty, but whe ther the state retained the power to enact the contested law, or had given up that powef to the general government. *If the state retains the power, then the president and senate cannot take it away by a treaty.* A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it cannot supersede a state law which enforces or exercises any power of the state not granted away by the constitution. To hold any other doctrine than this

would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation.....

"It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation....."

The people v. Naglee, 1 Cal. 246, pp. 246, 247.

In the consideration of the questions involving the powers of the Federal and State governments there exists the mental temptation to lodge all sovereign or governmental power in either the United States or the States. This disposition is evidenced by the frequent statement that there exists in this country *dual* sovereignties. All who reason thus, it seems to us, fall into error.

Judge Treiber of the District Court of Arkansas, in upholding the constitutionality of the Migratory Bird Law, in the case of United States vs. Thompson, quoted from an opinion of Attorney-General Cushing (8 Opinions of Attorney-Generals, 411-415), as follows:

"The power which the Constitution bestows on the President, with the advice and consent of the Senate, to make treaties is not only general in terms, and without any express limitations, but it is accompanied with absolute prohibition of the exercise of the treaty power by the states—that is, in the matter of foreign negotiation the states have conferred the whole of their power, in other words, all the treaty powers of sovereignty, on the United States. Thus, in the present case, if the power of negotiation be not in the United States, then it exists nowhere, and

one great field of international relation of negotiation and of ordinary public and private interest is closed up, as well against the United States as each and every one of the states. That is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency. Nay, it involves political impossibility. For, if one of the proper functions of sovereignty be thus utterly lost to us, then the people of the United States are but incompletely sovereign—not sovereign—nor in co-equality of right with other admitted sovereignties of Europe and America.”

The foregoing is a fair sample of the erroneous logic of those who contend that the Constitution creates an unlimited treaty-making power. Sovereign power is absolute, unrestricted power. There is nothing a sovereign may not do. The *people* of the United States are a sovereign people, but in a strict sense the United States is not a sovereign government, nor do the states possess sovereign powers. There exist sovereign powers which are not delegated to Federal authority, but the exercise of which likewise is prohibited to the states.

By the Tenth Amendment to the Constitution there is distinctly created *three* repositories of power. With more propriety it can be said that there exists in this Nation a *triple* sovereignty, than to say that there exists a *dual* sovereignty. It requires but cursory scrutiny of the Tenth Amendment to demonstrate the conclusive truth of the assertion that our Constitution creates three repositories of power. Amendment Ten reads:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

In so many words this provision recognizes that there are powers not delegated to the United States, but the exercise of which is prohibited to the States. The people of the United States possess sovereign power. Some of that power

has been delegated to the Federal Government. Some has been delegated or reserved to the States; there remains undisposed of power which is reserved "to the people" by the express terms of the Tenth Amendment. That up to this time the people have not created an agency by which to exercise a power which may not now be exercised by either the Federal or the State governments, does not militate against the soundness of our contention.

Mr. Justice Brewer, in the case of *Kansas vs. Colorado*, 206 U. S., recognized the existence of the three repositories of power in the following language (l. c. 90):

"But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to-wit, 'the people.' Its principal

purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it,—‘we, the people of the United States,’ not the people of one, state, but the people of all the states; and Article X reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.”

It may be conceded that it is an attribute of complete sovereignty to make a Migratory Bird Treaty, but it is a power reserved “to the people” and not delegated to the United States.

Recent events of the gravest importance furnish illustrations of the correctness of our position. That a full sovereign nation could enter into a treaty obligating itself to send troops on the call of an association of powers cannot be questioned, and yet, it is conceded by the most distinguished advocates of the League of Nations covenant that Article X imposes no *legal* obligation upon the United States to send

troops in such a situation, because such course would be an impingement upon the Constitutional prerogatives of the Congress. The power to make such a treaty, therefore, legally binding is reserved "to the people."

The possession of sovereign power by the United States would no doubt enable it to make a treaty with Japan relative to the admission of Japanese children in the schools of California. The recent controversy with Japan over that question may be summarized thus: Japan said to America that she would like to make a treaty admitting Japanese children to the schools of California. The United States replied, "That is a matter beyond national jurisdiction. The State of California alone controls its schools." Whereupon, Japan replied, "We will then make a treaty with California." To this our Government answered, "The Constitution of the United States prohibits California from making any treaty."

Where is a sovereign power of this kind lodged? The answer is, "In the people."

Applying the foregoing principle to the subject matter of the case at bar we find that the power to control migratory birds is lodged in the states. Many former decisions of this Court are to that plain effect. This is an exclusion of the exercise of any such power by the Federal Government. As the States may not make a treaty with respect to the matter, it follows that the power to make such a treaty is reserved not to the Federal Government, but "to the people," and only by amendment to the Constitution can such "reserved powers be taken from the people and lodged in the Federal Government.

IX.

The Federal Government is a government not only of enumerated powers, but it is also a government to which certain powers are denied. Powers denied are not to be implied: they are to be obtained, if obtained at all, from, and in the manner provided by, those who originally granted

the enumerated powers, but who at the same time denied other powers—the people.

Amendments to the Constitution, Arts. I to X, inclusive;

Barron v. Baltimore, 7 Pet. 243, 247;

Kansas v. Colorado, 206 U. S. 46, 89-90;

United States v. Shauver, 214 Fed. 154, 156;

Holden v. Joy, 17 Wallace, 243;

United States v. Rhodes, 1 Abb. U. S. Rep. 43;
Fed. Cases, 16151;

Fairbank v. United States, 181 U. S. 283, 288.

"But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act."

Kansas v. Colorado, 206 U. S. 46, 89-90.

"We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly

granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that, where prohibition is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed."

Fairbank v. United States, 181 U. S. 283, 288.

"The constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think, *necessarily applicable to the government created by the instrument*. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes."

Barron v. Baltimore, 32 U. S. 243, 247.

"That the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, is not inconsistent with the nature of our government and *the relation between the States and the United States*."

Holden v. Joy, 17 Wallace, 243, 21 L. Ed. 523.

"What is unwarranted or forbidden by the Constitution can no more be done in one way than in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the State governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The States possess all which they have not surrendered; the government of the Union only such as the Constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void."

United States v. Rhodes, 1 Abb. U. S. Rep. 43, 44;
Fed. Cases 16151.

"It is also claimed that it is one of those implied attributes of sovereignty in which the national government has concurrent jurisdiction with the states; that it is a dormant right in the national government; and, where the state is clearly incompetent to save itself, the national government has the right to aid. To sustain the latter proposition stress is laid on the fact that it is impossible for any state to enact laws for the protection of migratory wild game, and only the national government can do it with any fair degree of success; consequently the power must be national and vested in the Congress of the United States. A similar argument was presented to the court in *Kansas v. Colorado*, 206 U. S. 46, 89, 27 Sup. Ct. 655, 664 (51 L. Ed. 956), but held untenable."

United States v. Shauver, 214 Fed. 154, 156-157.

"4th. No legislation can be proper which is inconsistent with the letter and spirit of the Constitution; hence the trial and conviction of Milligan to death by court-martial, though claimed to be a means for the preservation of the Union, was held unconstitutional, because such trial and conviction were forbidden by the Constitution; and where, taking the whole Constitution in its distribution of powers between the departments of government, and the relation it establishes between the granted powers to the Federal government and the re-

served powers to the States, the act is not in accord with the whole scheme, but inconsistent with it—it is unconstitutional.

“5th. If Congressional legislation be inconsistent with the reserved rights of the States and their autonomy, it is unconstitutional.

“6th. If legislation be contrary to the trust nature of the power of Congress—that is, to the duty which Congress owes in respect to the subject-matter of the legislation to all the States, or to any of them—it would be contrary to the letter and spirit of the Constitution.”

Tucker on the Constitution, Vol. I, pp. 371-373.

“ *The right of local self-government as known to our system as a constitutional franchise belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained and to whom, by its terms, all power not conferred by it upon the Government of the United States was expressly reserved.*”

Murphy v. Ramsey, 114 U. S. 15, 44.

If Congress, without an amendment to the Constitution, can take away from the states their control over wild game by means of a treaty, why cannot it in the same manner take away from the states their control over intoxicating liquors? Why amend the Constitution to have National prohibition instead of making a treaty to that end with Turkey or some other foreign power? Now that there is a prohibition amendment to the Constitution, why not disregard it and by means of a treaty with England—whom rumor says is not overly pleased with our aridity—provide for the sale of intoxicants in each and every state of the Union?

Why resort to the expensive and time-taking method of amendment to the Constitution in any instance if the assent of the people is not necessary in those things which affect so intimately their private lives, but may be taken from them by agreement with some foreign power? In the language of the Chief Justice of the United States:

"I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every department of the government of the United States to support and defend the Constitution."

Downes v. Bidwell, 182 U. S. 344, 45 L. Ed. 1088.

X.

Among those powers denied to the Federal Government until secured by amendment are those which are "reserved" to the states respectively or to the people. These reserved powers include those purely internal affairs which "concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the state." Without exception wild game has been held to be a part of this mass which is within the exclusive and absolute power of the state. When the power of the states over their purely internal affairs is destroyed, the system of government devised by the Constitution is destroyed.

Downes v. Bidwell, 182 U. S. 244, 312-313, 369-370;

Pierce v. State, 13 N. H. 536, 576, 578;

Hammer v. Dagenhart, 247 U. S. 251;

South Carolina v. United States, 199 U. S. 447, 451;

Collector v. Day, 11 Wall. 125, 127;

Tucker, Limitations on Treaty-making Power, 92, 93, 129-130;

Geofroy v. Riggs, 133 U. S. 258, 267;

George v. Pierce, 148 N. Y. 230, 237;

Tucker on the Constitution, Vol. II, pp. 726, 727;

Federalist, p. 145;

People v. Gerke, 5 Cal. 381, 382, et seq.

"The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the Government, or of its department, and those arising from the nature of the Government itself and *that of the states*. It would not be contended

that it extends so far as to authorize what the Constitution forbids or a change in the character of the government *or in that of one of the states*, or a cession of any portion of the territory of the latter without its consent."

Geofroy v. Riggs, 133 U. S. 258, 267.

"If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions The treaty-making power then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted—vested with the right to destroy upon the one hand and deprived of all power to protect the government on the other."

Downes v. Bidwell, 182 U. S. 244, 312, 313.

The above was written by Mr. Justice White, now Mr. Chief Justice. Mr. Chief Justice Fuller did not agree with the conclusion reached in that case, and wrote a dissenting opinion; but in this dissenting opinion he expresses his agreement with Mr. Justice White upon this particular point as follows:

"The grant by Spain could not enlarge the powers of Congress, nor did it purport to secure from the United States a guaranty of civil or political privileges.

"*Indeed a treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would be simply void.*

"*'It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government.'* *The Cherokee Tobacco*, 11 Wall. 616, 620."

Downes v. Bidwell, 182 U. S. 244, 369-370.

"In our view the necessary effect of this Act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the Act in a two-fold sense is repugnant to the Constitution. *It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend.* The far-reaching result of upholding the Act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of states over local matters may be eliminated, and thus our system of government be practically destroyed."

Hammer v. Dagenhart, 247 U. S. 251 (38 Sup. Ct. Rep. 529.)

"As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially all state, legislation, as, for example, in the District of Columbia. *Within state limits, it can have no constitutional operation.* This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions (License cases, 5 How. 504; Passenger cases, 7 How. 283; License tax cases, 5 Wall. 470 (72 U. S. XVIII, 500,) and the cases cited) that we think it unnecessary to enter again upon the discussion.

U. S. v. DeWitt, 9 Wall. 41, 45 (19 L. Ed. 593.)

"It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said 'that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property.' And the ruling was given point by a citation of the power of the state over its wild

game, which might be preserved for its own citizens. In other words, the ruling was given point by the special power of the state over the subject matter—a power which exists in the case at bar, as we have seen.”

Heim v. McCall, 239 U. S. 175, 194.

“The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, *the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states.* Thus in *McCready v. Virginia*, 94 U. S. 391, 396 (24 L. Ed. 248, 249), the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulations related to the common property of the citizens of the state, and an analogous principle was involved in *Patson v. Pennsylvania*, 232 U. S. 138, 145, 146, 58 L. Ed. 539, 544, (34 Sup. Ct. Rep. 281), where the discrimination against aliens upheld by the court had for its object the protection of wild game within the states, with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased.”

Truax v. Raich, 239 U. S. 33.

“ a sovereign state, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders.”

Ward v. Race Horse, 163 U. S. 504, l. c. 510.

“Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other states of the Union, *a power resulting from the fact of statehood and incident to its plenary existence.*”

Ward v. Race Horse, 163 U. S. 504, l. c. 514.

“ The proposition that the State may not forbid carrying it beyond her limits involves, therefore, the contention that a State cannot allow its own people the en-

joyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. . . ."

Geer v. Connecticut, 161 U. S. 519, l. c. 529-530.

"The several states, as has been seen, possess the most absolute and plenary power of control over the subject-matter of wild animal and wild bird life with their territorial domains it is possible to either conceive or to grant."

United States v. McCullagh, 221 U. S. 288, 295, 296.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. *The legislature cannot, by any contract, divest itself of the power to provide for these objects.* They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. *That discretion can no more be bargained away than the power itself.*"

Beer Co. v. Massachusetts, 97 U. S. 32, 33; 24 L. Ed. 989.

"*In re Rahrer*, 140 U. S. 554, the Supreme Court of the United States, speaking through Chief Justice Fuller, made use of the following language: 'The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.'

"And this court has uniformly recognized State legislation, legitimately, for police purposes, as not in the sense of the Constitution infringing upon any right which has been confided, expressly or by implication, to the general government. . . ."

"The treaties and laws of the United States must be held to have been passed with reference to and subsidiary to the rightful exercise of the police power by the different States, in aid of the protection and preservation of the public health within their respective borders."

Compagnie v. Board, 51 La. Ann. 645, 660-662. Affirmed: 186 U. S. 380.

"In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. *Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States.*"

Cooley, Constitutional Limitations (7 Ed.), p. 831.

"Call them by whatever name, if they are necessary to the well-being and independence of all communities, *they remain among the reserved rights of the States*, no express grant of them to the general government having been either proper, or apparently embraced in the Constitution."

License Cases, 5 How. 627; 12 L. Ed. 312.

"We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. *That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now.* It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases."

The Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659; 24 L. Ed. 1036.

"On the other hand, the power to regulate the internal police of the state, which is lodged in, and guaranteed to the state authority, has for its objects, the inhabitants and residents of the state, considered as such (notwithstanding they at the same time owe duties to the United States, and are under obligations as citizens of that government), and all the property within its limits which may fairly be regarded as a part of the mass of property in the state."

Pierce v. State, 13 N. H. 536, l. c. 578.

"The power then of New York to pass this law having undeniably existed at the formation of the Constitution, the simple inquiry is, whether by that instrument it was taken from the states, and granted to Congress; for if it were not, it yet remains with them.

"If, as we think, it be a regulation, not of commerce, but police; then *it is not taken from the states.*"

City of New York v. Miln, 11 Peters 102, 132-133.

" 'This police power of the State,' says another eminent judge, 'extends to thjprotection of the lives, health, comfort, and quiet of all persons, and the protection of all property within the State. . . . ' (By this) 'general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right in the legislature to do which, no question ever was, or, upon the acknowledged general principles, ever can be made, so far as natural persons are concerned.' *Thorpe v. Rutland*, 27 Vt. 140, 149. *And neither the power itself, nor the discretion to exercise it as need may require, can be bargained away by the State.* *Beer Company v. Massachusetts*, 97 U. S. 25, 33."

Cooley's Constitutional Limitations, 7 Ed., pp. 830-831.

"Among those matters which are implied, though not expressed, is that *the Nation may not*, in the exercise of its

powers, *prevent a State from discharging the ordinary function of government*, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it."

South Carolina v. United States, 199 U. S. 447, 451;
50 L. Ed. 261.

" ; for, *in this respect*, that is, in respect to the reserved powers, the *State is as sovereign and independent as the general government.*"

Collector v. Day, 11 Wall. 125, 127; 20 L. Ed. 122.

"It is a plain case of a subordinate overruling his superior, of the creature being superior to the creator. Every reputable commentator upon the Constitution from Story down to the present day, has held that the legislative powers of Congress lie in grant and are limited by such grant. This statement in effect declared that when a treaty that may need legislation to carry it into effect, has embraced a subject which Congress cannot legislate upon, because not granted the power under the Constitution, that the *treaty power may come to its own assistance and grant such right to Congress, though the Constitution, the creator of both, has denied it.* Such interpretation would clothe Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power."

Tucker, Limitations Treaty-making Power, pp. 129,
130.

"If we are to accept, therefore, the literal meaning of the words in Article VI, as applied to treaties, and give to them the supremacy which it is claimed the letter of the Constitution accords them, what is the result? In the first place, every power delegated to the Congress of the United States for its execution may be surrendered to the treaty power. The, purpose which the framers of the Constitution had that the imposition of taxes, the regulation of commerce, the establishment of postoffices and post-roads, the coining of

money, the naturalization of foreigners, and the like, should be accomplished only through the action of representatives elected by the people of the States, and the Senators representing the States, is abandoned and the powers are surrendered to the President and the Senate in the making of treaties with foreign countries; in the second place, after providing, as was their intention, for a republican form of Government, it must be presumed they deliberately inserted Article VI to change that form to the government of an oligarchy; and, thirdly, that after they had determined in their wisdom to concede to Congress powers of legislation in certain particulars, and that all else was to be left with the States or to the people, who were supposed to know better than anyone else, what was best for them in their respective localities, they deliberately reversed their action and inserted this article, which might exclude their representatives in Congress from a voice in any legislation, and give to the President and the Senate the power to uproot and destroy what had already been conceded to Congress and the States. And all this results, it is claimed, because the word 'Treaty' may embrace any subject that pertains to the people as citizens of the State or Nation.

"St. George Tucker, Story, Rawle, Willoughby, Pomeroy, and Cooley, and every reputable writer upon the Constitution, declare that the treaty-power can do nothing which tends to destroy the Constitution itself. *Can it be doubted that the power to take away the right of Congress to legislate, or the right of the people of the States to regulate their own local affairs is the power to destroy the basic principles of the Constitution of our country?*"

Tucker, *Limitations on Treaty-making Power*, pp. 92, 93.

If the Federal authorities, by means of a treaty with some foreign government, could acquire and exercise the powers reserved to the states and denied to Federal authorities under the Constitution, the logical and inevitable result would be anomalous. The President and Senate could by treaty with some foreign power control the laws of a state relating to in-

spection, quarantine, health and internal trade; they could prescribe the times and modes of elections, and force the introduction and sale of opium, intoxicating liquors or any other substance, however injurious to the health and well-being of a state; they could cede to a foreign power a state or any part of its territory, and destroy the securities of liberty and property as effectually as the most despotic government ever formed.

But this is not all. If the treaty-making power is not within the constitutional limitations relating to the powers reserved to the states, it is not limited by any restriction of the Constitution. The Federal Government itself, as well as the several states, would be at the mercy of the President and the Senate. They could regulate foreign commerce in spite of the fact that Congress is expressly authorized to control the same. They could provide for duty rates upon articles imported from foreign nations, or admit them free of duty, although Congress has express authority to lay and collect taxes and duties. They could appropriate directly from the public treasury the public moneys in the face of the express power of Congress to originate all such appropriations. They could dispose of any part of the territory of the United States, or any of their property, without the consent of Congress, which alone has power to dispose of and make rules and regulations of the property of the United States. *In short, the Federal Government would be a government of men, and not of laws.* The question is not whether or not they will do these things but whether or not, under our form of government, they have the power.

XI.

Those who maintain that the reserved powers of the states are subject to treaties and may be taken from the states respectively, or the people, by means of a convention with some foreign power, rest their position upon the assertion that "a treaty is the supreme law of the land." If a treaty be the supreme law of the land, it has become so by *construction*, for the Constitution as ratified by the people made the supreme law of the land to consist of three things:

1st—The Constitution; 2nd—the laws of the United States which shall be made in pursuance thereof; 3rd—all treaties made or which shall be made *under the authority of the United States*. The Constitution is the God-head of this trinity. It yields to neither law nor treaty, nor anything else save and alone the sovereign will of its creator—the people. The powers reserved to the states respectively or to the people are, under this Constitution as sacred as the power to make treaties. Are they not even more so since they are the object of *specific reservation* and necessarily limit or restrict the *general grant of power* made to the treaty-making department of the government?

- Hamilton's Works, Vol. IV, p. 342;
 Cooley, The Forum, June, 1893, p. 397;
 Von Holst, Const. Law of United States, p. 202;
 Duer, Lectures on the Constitution Jurisprudence of the United States, (2 Ed.) p. 228.
 Tucker, Limitations, Treaty-making Power, pp. 128-129, 135-136, 139, 93-94, 86-87;
 Judge Shackelford Miller, quoted in Tucker, Limitations, Treaty-making Power, pp. 21, 22;
 The People v. Naglee, 1 Cal. 246, 247;
 59th Congress, 41 Congressional Record, Part 1, p. 299;
 William Archer Cocke, Constitutional History of the United States, p. 235;
 Mr. Marcy, Moore's Int. Law Dig., Vol. V, p. 168;
 Compagnie v. Board, 51 La. Ann. 645; 186 U. S. 380; affirmed: 186 U. S. 380.
 Butler Treaty-Making Power, Vol. I, p. 63, Sec. 37, and note.
 Benjamin Harrison, North American Review, January, 1901, p. 110;
 Story's Commentaries on the Constitution, 5 Ed., pp. 217-220;
 Thorp, Constitutional History, Vol. 2, Chap. 6, p. 199;
 Loan Association v. Topeka, 20 Wall. 655, 662-663;

Jefferson, Manual of Parliamentary Practice, p. 110, note 3.

4 Elliott's Debates, p. 464;

Geofroy v. Riggs, 133 U. S. 266, 267.

"A treaty cannot be made which alters the Constitution of the country, or *which infringes any express exceptions to the power of the Constitution of the United States.*"

Hamilton's Works, Vol. IV, p. 342.

"When a treaty is said to be the supreme law, it is nevertheless to be understood that the Constitution, which is the highest expression of sovereign will and the authoritative representative of sovereign power in the nation, in fixing limitations upon the exercise of authority under it in regard to the subjects above indicated and many others, *restrains the treaty-making power quite as much as any other.* If it did not, and any treaty entered into in due form was in itself necessarily supreme law, a State might possibly by the force of it be set off from the Union to another nation, or the government might gradually and imperceptibly be overturned through a line of precedents constituting what at the time were perhaps not seen to be encroachments."

Cooley, the Forum, June 1893, p. 397.

"If, therefore, the supremacy of a treaty depends upon this Article, we have the right to conclude that since the supremacy accorded treaties made under the authority of the United States is the same as that accorded the laws of Congress, no greater supremacy should be accorded the one than the other, for the grant of supremacy to each is exactly the same, and if the one (the law of Congress) must conform to the Constitution, surely the other must do likewise. If the one cannot legislate on local affairs within the States because it would be unconstitutional, the other cannot barter or trade them in agreements with foreign countries for the same reason."

Tucker, Lim. Treaty-Making Power, p. 139.

"In defense of the claim of unlimited power to make treaties on all subjects by the United States with other countries, it is often recorded with pride that no treaty ever entered into by the United States has been set aside and declared null and void by the Supreme Court of the United States. This, if true, is indeed a subject upon which we have a right to congratulate ourselves and the country; for while we do not impugn the patriotism of the President, or the wisdom of the Senate, nor indeed the desire of each in the discharge of their duties under the treaty-making power, to conform to the restrictions of the Constitution, *the possession of an unlimited supreme power in any person or any body of men is not consistent with a republican form of government*, and its possession by them is a constant menace to the liberties of the people.

"Chief Justice Taney has powerfully expressed his views on this subject:

" 'It will hardly be said, that such a power was granted to the general government in the confidence that it would not be abused. The statesmen of that day were too wise and too well read in the lessons of history and of their own times, to confer unnecessary authority under any such delusion.'

"In the same case, page 516, Justice Daniel says:

" 'If this extraordinary proposition can be taken as universally or as generally true, . . . the Constitution of the United States with all its limitations on Federal power, and as it has been heretofore generally understood to be a special delegation of power, is a falsehood or an absurdity. It must be viewed as the creation of a power transcending that which called it into existence; a power single, universal, engrossing, absolute. Everything in the nature of civil or political right is thus engulfed in federal legislation, and in the power of negotiating treaties.' "

Tucker, Lim. Treaty-Making Power, pp. 128-129.

" 'The Federal Government' is often carelessly spoken of as having its existence independent of and without relation to the States. Many fail to observe not only the close con-

nection which the States have with the Federal Government, but the fact that *the States are integral parts of the Federal Government, without which the latter could not exist*. In one sense they are the underpinning, in another they are the piles upon which the structure rests, and neither can be withdrawn without damage to the structure they support.

"An examination of the Constitution shows this very plainly. Article I, sec. 2, shows that the House of Representatives is dependent upon the States for its existence. Article I, sec. 3, (now the 17th Amendment) shows that the Senate is dependent for its existence upon the States. Article II shows that the office of President is dependent upon the States. The judicial power of the United States, as set forth in Article III, recognizes the States as integral parts of the Federal Government; and when we look at the distribution of powers under the Constitution, giving to different departments specific powers, it is difficult to understand, if this was necessary to prevent the absorption of unlimited power in any one hand, *how this power as now claimed found its way into the Constitution, supreme over all others and acknowledging its inferiority not even to the Constitution itself; with no guide but its own will; with no restraint but its own ambition; with no limits but its own greed.*"

Tucker, *Lim. Treaty-Making Power*, pp. 135-136.

"On still another side this question of the direct relation between the treaty-power and the legislative power makes it difficult to fix the limits of the treaty power. *It is certain that no authority granted by the constitution to any of the factors of government can be withdrawn from it by treaty*. For that would be a change of the constitution and, as such, unconstitutional."

Von Holst, *Constitutional Law of the United States*, p. 202.

" . . . ; and in order to ascertain whether the execution of the treaty-making powers can be supported in any given case, those principles of the Constitution from which the power proceeds should carefully be applied to it. The power must,

indeed, be construed in subordination to the Constitution; and, however in its operation it may qualify, it cannot supersede or interfere with any other of its fundamental provisions, nor can it ever be so interpreted as to destroy other powers granted by that instrument. A treaty to change the organization of the Government, or annihilate its sovereignty, or overturn its republican form, or to deprive it of any of its constitutional powers, would be void; *because it would defeat the will of the people, which it was designed to fulfill.*

Duer, Lectures on the Constitutional Jurisprudence of the United States, (2 Ed.) p. 228.

"I have followed this historical treatment of the treaty-making power from the Constitutional Convention of 1787, to the present time, purposely omitting any direct mention of the decisions in order that we might see what effect those decisions had from time to time upon the definitions and descriptions of the power as given by subsequent writers. The result is interesting and peculiar. In 1802 Tucker, the first author, cited no authority except the text of the Constitution; thirty years later Story cited Tucker, Rawle and Jefferson; while in 1880 Cooley cites Tucker and Story, as herein quoted, in support of his text. The reason for this is plain, since the judicial decisions have been only so many applications of the general rule to specific statements of fact. For it is readily seen that while many of the decisions contain broad general statements to the effect that treaties are the supreme law of the land, there is always the accompanying qualification that it must be a constitutional treaty in order to be so considered."

Judge Shackelford Miller, quoted in Tucker, Lim. Treaty-making Power, pp. 21, 22.

"But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the state law give way. The question in such case would not be solely what is provided for by the treaty, but whether the state retained the power to enact the contested law, or had

given up that power to the general government. If the state retains the power, then the president and senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, *it cannot supersede a state law which enforces or exercises any power of the state not granted away by the constitution.* To hold any other doctrine than this, would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation. . . .

"It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation. . . ."

The People v. Naglee, 1 Cal. 246, 247.

"The second school stand upon the doctrine that the treaty-making power exists for the purpose of carrying out the purposes and objects of this Government as prescribed and defined by the Constitution, and that no treaty is valid that violates the Constitution, or *that under its provisions surrenders the rights reserved and belonging to the states.*"

Senator Rayner, 59th Congress, 41 Congressional Record, Part 1, p. 299.

"What limits does it place upon the treaty-making power? None whatever. There is no limit to the exercise of this power when reduced to any particular case, but it is to the form of executing the power which is a simple concurrence of two-

thirds of the Senate. I do not say that there is no check or restriction upon the functions of the Government, for there is this limit, that *it cannot be exercised in the destruction of or in opposition to any known Constitutional right or power, and must be subordinate to every other right recognized.*"

William Archer Cocke, Constitutional History of the United States, p. 235.

"It is not, as you will perceive by examining Mr. Drouyn de L'Huys's dispatch to the Count de Sartiges, the application of the 'principle' to the particular case of M. Dillon, which is to be disavowed, but the broad and general proposition that the Constitution is paramount in authority to any treaty or convention made by this government. This principle, the President directs me to say, he can not disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was the paramount law."

Mr. Marcy, Moore's Int. Law Dig., Vol. V, p. 168.

"In *re Rahrer*, 140 U. S. 554, the Supreme Court of the United States, speaking through Chief Justice Fuller, made use of the following language: 'The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized State legislation, legitimately for police purposes, as not, in the sense of the Constitution, infringing upon any right which has been confided, expressly or by implication, to the general government. . . .'

"The treaties and laws of the United States must be held to have been passed with reference to and subsidiary to the

rightful exercise of the police power by the different States in said of the protection and preservation of the public health within their respective borders."

Compagnie v. Board, 51 La. Ann. 645; Affirmed
186 U. S. 380.

"The claim asserted for the treaty-making power that it may embrace all rights and all subjects because the word 'Treaty' may embrace such, cannot be maintained for another reason. The principle must be accepted as established, that where in any instrument a *general* grant is made, which is followed in the same instrument by a *specific* grant, that the 'general' is limited by the 'specific' grant. This is undoubtedly true of wills and deeds. A testator who devises *all* of his real estate to his wife and in a subsequent portion of his will devises his home place to his son, is considered to have limited the devise of *all* of his real estate to his wife by the *specific* devise of the home place to his son. The same principle will apply to a deed of real estate.

"This principle applies peculiarly to the case of the treaty power. Article II, sec. 2, grants to the President and Senate the power, without any limitation, to make treaties; since treaties may embrace all rights of person and property, some of which may be included in the powers granted in the same Constitution, to the President, to the Congress, the Judiciary, and some also, which by the same instrument, are reserved to the States, this would seem to be a sweeping and unlimited general grant to the treaty-making power; but when we find the same instrument, which has made this unqualified *general* grant to the treaty power, has granted to the President, to the Congress, to the Judiciary, certain specific powers, and reserved to the States certain *specific* powers and rights, the *general* grant to the treaty-making power is limited by the *specific* grants mentioned. This is the well-established rule of construction, and to hold otherwise would be to hold that the Convention, after carefully constructing a constitutional government, granted to one of the branches of the government the power to destroy it all."

Tucker, Limitations, Treaty-making Powers, pp. 93-94.

"It would be to convict the framers of the Constitution of a lack of foresight, which cannot properly be imputed to them, to suppose they intended to give to this treaty-making power unlimited scope to absorb every right of the people of the States, against which they had so carefully guarded in the enumeration of the powers of Congress and by the reservations in the Tenth Amendment. The powers of Congress, the Executive, and the Judiciary were enumerated in detail. And all powers not granted were, under the Tenth Amendment, reserved to the States or to the people respectively. Of what avail it it to know that the Framers of the Constitution securely preserved to the people their sacred local rights from the grasp of Congress, the President, or the Judiciary if they can be absorbed under the treaty-making power? If the Federal Government can take them, it matters little what department may claim the right."

Tucker, *Limitations, Treaty-making Power*, pp. 86-87.

"For themselves our fathers were not content with an assurance of these great rights that rested wholly upon the sense of justice and benevolence of the Congress. The man whose protection from wrongs rests wholly upon the benevolence of another man or of a congress, is a slave, a man without rights. Our fathers took security of the governing departments they organized, and that notwithstanding the fact that the choice of all public officers rested with the people. They were not content with general and unwritten limitations, but forced into the Constitution written limitations as to the exercise of sovereignty by the ruling power."

Butler, *Treaty-making Power*. Vol. I, p. 63, Sec. 37, and note.

See Benjamin Harrison in *North American Review*, January, 1901, p. 110.

"The theory of fundamental principles had its inception as early as the framing of the Constitution. To many the adoption of the first ten amendments, commonly known as the Bill of Rights, was wholly unnecessary. There were

members of the Constitutional Convention who considered that the enumeration of certain fundamental rights would be dangerous, as it might result in the exclusion and to the derogation of other rights equally fundamental, but which might possibly be omitted in the enumeration. The first ten amendments, however, were added in order to satisfy the wishes of those who felt that the personal rights of freedom and liberty therein enumerated should be specifically preserved to the people."

See 1 Story's Commentaries on the Constitution, 5 Ed., pp. 217-220;

Thorp, Constitutional History, Vol. 2, Chap. 6, p. 199.

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Loan Association v. Topeka, 20 Wall. 655, 662-663.

Those who hold that a treaty is the supreme law of the land say that "If the framers of the Constitution had intended to correlate the treaty-making power of the United States with the law-making power of Congress, or to otherwise limit its scope, they would have so expressed themselves, and then instead of appearing as it does, this article would have probably been written as follows: This Constitution and the laws of the United States, and all treaties made or which shall be made in pursuance thereof, shall be the supreme law of the land."

This argument overlooks the fact that the United States existed under the Articles of Confederation and the purpose was to include treaties made under that authority as well as

those which should be made under the Constitution. The "*Authority of the United States*" under the Articles of Confederation and under the Constitution was an authority derived from enumerated powers accompanied by specific reservations, and under both the Articles of Confederation and the Constitution certain rights of the states respectively and the people were jealously guarded by express exceptions. There was and could be no "authority of the United States" outside of and beyond that given by the Articles of Confederation and the Constitution.

That a treaty stands upon an equal footing with law of the United States is settled (*Cherokee Tobacco*, 11 Wall. 616; *Ward v. Race Horse*, 163 U. S. 504). Supremacy is to be predicated of neither; each takes its place *under the Constitution*, and only when in harmony with the powers therein granted or excepted is of any binding effect whatever. In the language of Mr. Madison:

"It must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way." Jefferson, *Manual of Parliamentary Practice*, p. 110, note 3.

The term "treaty" as herein used must undoubtedly be given a broad meaning, and generally speaking, it may be said that by this clause there is conferred the power to make treaties on those matters ordinarily the subject of treaties between sovereign powers. But in the very nature of things, there must be placed a limit on the treaty-making power, else that power would destroy many of the other provisions of the Constitution. One of the canons of construction is that a meaning must be placed on one part of the Constitution that will not interfere with the meaning of the other parts thereof, in order that effect may be given to the whole.

Can the power of Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water" be taken away by treaty, and conferred upon other authority?

Can the power of Congress "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures" be taken away by treaty, and conferred upon other authority?

The powers of the states as set forth in the Constitution are upon an absolutely equal footing with the powers of the United States. Can, therefore, a power by the Constitution reserved to the states be taken away by the treaty-making power?

No one, it seems to us, would have the temerity to maintain that the treaty-making power would have authority to make any treaty divesting the Congress, or the United States, of any of its constitutional powers, and the conclusion, therefore, is inescapable that the power to make a treaty, or to make treaties, is not an unrestricted power.

The only difficulty with respect to the subject is, Where shall the line of restriction be drawn? We submit the following rule:

The treaty-making power is unrestricted, except that no treaty shall violate any of the provisions of the Constitution, and shall not violate any of the powers of the United States, or any of the powers reserved to the states. The power to by treaty violate the present powers of the United States, or the powers now reserved to the states, is reserved "to the people," and when the necessity arises the people will create by appropriate amendment to the Constitution an instrumentality through which to make such a treaty.

Distinguished authority exists for such a rule. John C. Calhoun (4 Elliott's Debates, p. 464), in discussing the limitations on the treaty-making power, said:

"Whatever requires the consent of another nation belongs to the treaty power—can only be regulated by it; and it is competent to regulate all such subjects, provided—and here are its true limits—such regulations are not inconsistent with the Constitution. If so, they are void. No treaty can alter the fabric of our Government; nor can it do that which the Constitution has expressly forbidden to be done; nor can it do that differently which is di-

rected to be done in a given mode, and all other modes prohibited."

Differing in verbiage only, Mr. Justice Field, in *Geofroy vs. Riggs*, 133 U. S. 266-7, laid down a similar rule:

"That the treaty power of the United States extends to all proper subjects of negotiation between our Government and the government of other nations is clear. The treaty power as expressed in the Constitution is in terms unlimited, except by those restraints which are found in that instrument against the action of the Government or of its departments and those arising from the nature of the government itself and of *that of the states*. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government, or *in that of one of the states*, or a cession of any portion of that territory of the latter, without its consent. *Railroad Co. vs. Lowe*, 114 U. S. 523, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

XII.

The cases usually cited by those who advocate the supremacy of a treaty do not in any instance hold that the reserved powers of a state or a trust which the state holds for the benefit of all its people are subject to and may be annulled by a treaty having for its subject the regulation of a matter which is reserved to the states respectively or to the people by the Tenth Amendment.

The case most often cited and quoted by those who claim that a treaty is the supreme law of the land is *Ware v. Hylton*, 3 Dallas 199. Five judges sat in the case, but only four took any part in its decision. Each rendered a separate opinion. There was no opinion by the court. Three of the

four judges "held either that the state law was invalid, or, if valid, that it did not actually attempt to confiscate debt." In either case there could have been no conflict between the law and the treaty, according to the majority of the court, since either there was no law, because invalid, or it did not attempt to do anything contrary to the terms of the treaty. Mr. Justice Chase did hold that Virginia had a right to confiscate debts, and by the law of 1777 did confiscate debts, but this was no defense in the face of the Treaty of Peace. This was not the opinion of the court, nor the opinion of a majority of those who decided the case. (See Tucker, *Limitations on Treaty-making Power*, Chap. 7, p. 173 et seq.)

The case of *Chirac v. Chirac*, 2 Wheat. 259, and the case of *Geofroy v. Riggs*, 133 U. S. 266, do not hold that the treaty annuls the laws of inheritance passed by the states, but that the badge of alienage which prevented their taking under the laws of the states, was removed. The laws of the state were in full force and effect, but only the Federal Government could declare who was an alien. Mr. Justice Field, who wrote the opinion in *Geofroy v. Riggs*, wrote the opinion in *Fox v. United States*, 94 U. S. 320, in which he said:

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

If it be held that *Geofroy v. Riggs* holds that a state law relating to inheritance is annulled by the treaty, it is in direct conflict with the case of *Fox v. United States*. The cases should be held to harmonize rather than to conflict, particularly as both were written by the same judge and no reference is made in the former to the latter.

The cases of *Orr v. Hodgson*, 4 Wheat. 453, and *Fairfax v. Hunter*, 7 Cranch 603, were both decided by Justice Storey upon the same principle; namely, that the badge of alienage was removed and the law of the state remained intact, and all who inherited in the state took under the terms of that law.

The principle of the above cases is thus stated in the case of *People v. Gerke*, 5 Cal. 381, 384:

"One of the arguments at bar against the extent of this power of treaty is that it permits the Federal Government to control the internal policy of the states, and in the present case, to alter materially the statute of distribution.

"I think, however, that no such consequence follows as is insisted. The statutes of distribution are not altered or affected. Alienage is the subject of the treaty. This disability results from political reasons which arose at an early period of the history of civilization, and which the enlightened advancement of modern time and changes in the political and social condition of nations have rendered without force or consequence. The disability to succeed to property is alone removed. *The character of the person is made politically to undergo a change, and then the statute of distribution is left to its full effect unaltered and unimpaired in word or sense.*"

"If my conclusions about these cases be not correct, this anomaly is presented that the Supreme Court from *Ware v. Hylton* to *Geofroy v. Riggs* has decided uniformly that a treaty annulled state laws in conflict with it and yet has recently decided the cases of *Compagnie Francaise v. The Board of Health*, *Rocca v. Thompson*, *Patsone v. Pennsylvania*, and *Heim v. McCall*, sustaining the laws of States which conflicted with existing treaties between the United States and foreign countries. To adopt such a conclusion is to hold that the Supreme Court has reversed its position on this question. This I do not believe, but more rationally these later

decisions serve to interpret the earlier ones, making the action of the Court throughout its history consistent and uniform."

Henry St. George Tucker, Address before Georgia Bar Association, June 2nd, 1917, p. 23.

See also Tucker, Limitations on Treaty-making Power, Chap. 6, p. 143 et seq.

The case of *Haunenstein v. Lynham*, 100 U. S. 483, involves a treaty and a state law of Virginia. The Virginia law provided that an alien who, by treaty, had a right to sell real property in that state, might do so within the time prescribed by such treaty. No time was prescribed in the treaty, and the Virginia court held that the land escheated to the state. The Supreme Court of the United States held that a reasonable time was presumed, though no time was specified in the treaty. This does not present a case of conflict in any sense.

The lower court, in deciding this case at bar and in holding that the treaty-making power could annul a trust held by the State for the benefit of all its people, and its reserved powers, cites the case of *Hoke v. United States*, 227 U. S. 321-322. That case in no manner involves a treaty and is a discussion of the powers of Congress over interstate commerce. Instead of being an authority in support of the contention of the lower court, its "foreshadowing" is in our favor to this extent:

"It may be that Congress could not prohibit the manufacture of the article in a state. It may be that Congress could not prohibit in all of its conditions its sale within a state."

Hoke v. United States, 227 U. S. 1. c. 322.

The real basis of the opinion of the lower court holding that while the law would be unconstitutional if it stood alone, but was constitutional in that it was made in aid of a treaty, seems to be an opinion of a former Attorney-General of the United States, Mr. John W. Griggs (Vol. 22, *Opinions of Attorney-General*, p. 215 et seq.).

We do not doubt the power of the United States to make a treaty with Great Britain concerning regulations for the taking of fish or seals within waters or territory over which Great Britain and the United States under their Constitutions have power to make such regulations. That is a very different proposition from the one here involved; namely, the power of Congress to acquire by treaty the right to make rules and regulations for the taking of wild game within territory within which, under our Constitution, Congress has no right to regulate the taking of such game. In the language of *United States v. DeWitt*, 9 Wall. 41:

"As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as, for example, in the District of Columbia. Within state limits, it can have no constitutional operation."

When the Federal Government acts through its power to control commerce, its action is limited by the extent of its power under the Constitution. When the Federal Government acts under its treaty-making power, the binding effect of the things which it agrees to do is limited by its power under the Constitution to do those things. The power of the Federal Government to make treaties is exclusive and plenary, *but the things which it can bind itself to do under a treaty are limited by the powers which it possesses under the Constitution and by any and all exceptions to its power specified in the Constitution.* There is a difference between exclusive and full power to make treaties and the power to insert in the treaty terms and conditions which shall bind the United States to do any and every thing. The Government of the United States is one government, but that government does not possess the power to do any and every thing. There are some things which remain at the pleasure and will of the source of all power—the people. There are some things which the people never intended that the Federal Government should have the power to do. To give the Federal Government the power to do those things, by treaty, is to enlarge the jurisdiction of

the United States by construction, defeat the will of the people, and effectually change the form of government designed by the Constitution. It means the establishment of a principle which, followed to its ultimate and logical conclusion, means that nothing is reserved to the states or to the people. In the language of Mr. Justice Daniel in the Passenger cases: "Every thing in the nature of civil or political rights is thus engulfed in Federal legislation, and in the power of negotiating treaties."

The power of the Federal Government and the government of Great Britain to provide, by treaty, the terms upon which the citizens of one may take game within the territory of the other, or to agree by treaty that they will fix the time when and the methods by which fish and game may be taken *w!thin the territory over which the respective governments have power to prescribe such times and methods*, is one thing, but it is another and very different thing for such governments, in such treaty, *to provide the Federal Government with the power to prevent its own citizens from taking wild game within the limits of their respective states, when, under the Constitution, the Federal Government possesses no such power.*

The learned District Judge who delivered the opinion below seems to have been largely influenced in his decision by the advantages to be obtained through the treaty in question. He says (Printed Abstract, p. 13):

"The people of both countries, of our entire union and of all the states, benefit by the mutual and reciprocal advantages which accrue from this arrangement. If this be so, then the subject matter comes properly within the treaty-making power."

We do not believe that, under the Constitution and the general grant of power to make treaties, it was ever intended that the Federal Government had the power to do *anything and everything which it might deem to the advantage of the people*. Such power, in effect, would be unlimited power, because it would embrace within its scope anything and everything.

To this argument we reply in the language of General George Washington:

"If, in the opinion of the people, the distribution of Constitutional powers be in any particular wrong, let it be corrected in the way which the Constitution designates. But let there be no change by usurpation, for this, though it be in one instance be the instrument of good, is the ordinary weapon by which free governments are destroyed."

And in the language of Abraham Lincoln:

"It is my duty and my oath to maintain inviolate the right of the states to order and control, under the Constitution, their own affairs, by their own judgment exclusively. Such maintenance is essential for the preservation of that balance of power on which our institutions rest."

And in the language of Mr. Chief Justice Fuller, in *United States v. Knight*, 156 U. S. 13:

"Acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

XIII.

In its ultimate analysis the adoption of the Treaty-Supremacy theory means that the Federal Government, through the treaty-making department of the government, has a *general negative* upon all state laws passed by the States in the exercise of their reserved powers. In the making of the Constitution a negative, in any form, upon laws passed by the States in the exercise of their reserved powers, was defeated though persistently urged, in some form, by some of the ablest men in the Constitutional Convention. It was universally admitted that under the Constitution as it stood the Federal Government had no such power, and by the first ten amendments the people undertook to forestall any attempt on the part of the Federal Government to obtain such power by construction.

The history of the making of the Constitution of the United States shows beyond question that the most liberal constructionists of the Constitution saw, and frankly admitted, the fundamental limitations of the Federal Government which were inherent in the very nature and character of the Government itself. Recognizing the fundamental limitations of the Federal Government and the extent of the powers reserved to the several states under the Constitution as written, they endeavored and labored to their utmost to insert into the Federal Constitution some provision which would give Congress a negative upon the laws passed by the several states in the exercise of their reserved powers. Mr. Randolph, Mr. Pinckney, Mr. Patterson and Hamilton all proposed provisions of this nature, but in vain. Mr. Calhoun, speaking of this struggle to subject the reserved powers of the state to a federal negative, says:

"It is not deemed necessary to trace, through the journals of the convention, the history and the fate of these various propositions. It is sufficient to say,—that they were all made, and not one adopted, although perseveringly urged by some of the most talented and influential members of the body, as indispensable to protect the government of the United States, against the apprehended encroachments of the governments of the several states. The fact that they were proposed and so urged proves, conclusively, that it was believed, even by the most distinguished members of the national party, that the former had no right to enforce its measures against the latter, where they disagreed as to the extent of their respective powers,—without some express provision to that effect; while the refusal of the convention to adopt any such provision, under such circumstances, proves, equally conclusively, that it was opposed to the delegation of such powers to the government, or any of its departments, legislative, executive, or judicial, in any form whatever.

"But, if it be possible for doubt still to remain, the ratification of the Constitution by the convention

of Virginia, and the 10th amended article, furnish proofs in confirming so strong that the most skeptical will find it difficult to resist them." Works of Calhoun, pp. 266-247.

Although these attempts to give the Federal Government some negative upon the reserved powers of the states failed, and although the Nationalists openly recognized the fundamental limitations of the Constitution inherent from the nature and character of the instrument itself, some of the states were not willing to ratify the Constitution until that instrument itself expressly set forth certain limitations and restrictions upon its own power. In other words, they were unwilling to rest their reserved powers upon the fundamental limitations which arose from the nature and character of the Federal Government, but they insisted upon writing into the Constitution itself express limitations and restrictions upon the power of the Federal Government in relation to the reserved powers of the several states. As a result, some of the states, particularly Virginia, Massachusetts, New Hampshire, South Carolina and New York, deeply concerned about the reserved powers of the states and fearful lest some construction might be put upon the Constitution which would impair, if not destroy, those reserved powers, insisted upon, and put into their ratification of the Constitution, the express conditions later embodied in the original amendments. The Nationalists in vain insisted that such amendments were unnecessary, because they were secured by the fundamental limitations inherent in the nature and character of the Government. The states took no chances. They believed in the fundamental limitations arising out of the nature of the Federal Government, but they insisted that the Constitution should contain express limitations which future construction could not override. Mr. John C. Calhoun, speaking of Virginia's ratification, said:

"That her object was to guard against the abuse of construction, the act itself, on its face, and the discussions in her convention abundantly prove. It was done effectually, as far as it depended on

words. It declares that all powers granted by the Constitution, are derived from the people of the United States; and may be *resumed* by them when *perverted* to their injury or oppression; and, that every power *not granted*, remains with them, and at their will; and that no right of any description can be canceled, abridged, restrained or modified by Congress, the Senate, the House of Representatives, the President, or any department, or officer of the United States. Language cannot be stronger. It guards the reserved powers against the government as a whole, and against all its departments and officers; and in every mode by which they might be impaired; showing, clearly, that the intention was to place the reserved powers beyond the possible interference and control of the government of the United States." Works of Calhoun, pp. 249-250.

Since the powers reserved to the several states were protected not only by refusal to insert in the Constitution any provision which would give to the Federal Government a negative upon such powers, but also by express limitations upon the construction of enumerated powers, and the specific reservation to the states, respectively, or to the people, of all power not delegated to the United States by the Constitution, nor prohibited by it to the states, it is difficult to understand the logic of the contention which claims for the treaty-making power a negative upon the powers reserved to the several states. A part cannot be greater than the whole; the Federal Government in its entirety cannot be subject to the fundamental limitations arising out of its nature and the conditions of its organization, and to the express limitations written into the Constitution itself, and still, at the same time, the treaty-making power—which is only one of the enumerated powers—be absolute and unlimited. The treaty-making power has no supremacy apart from the Constitution, and can have no authority outside of and beyond the fundamental and express limitations of that instrument.

CONCLUSION.

Treaties are not to be treated with levity, nor are they to be given a sanctity which shields them from inspection and rejection, if, by their terms they do that which the Constitution forbids, and destroy essential rights of the States respectively or the people.

"I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of department of the government of the United States to support and defend the Constitution."

Downes v. Bidwell, 182 U. S. 244, l. c. 344.

But in the case at bar, may we not preserve both the treaty and the rights guaranteed by the Constitution?

In the case of *Compagne v. Board*, 186 U. S. 380, 395, this Court said:

"... the treaty was made *subject to* the enactment of such health laws as the local conditions might evoke *not paramount to them*."

In the case of *Heim v. McCall*, 239 U. S. 175, 194, commenting upon the case of *Patsone v. Pennsylvania*, this Court said:

"Adopting the declaration of the court below, it was said 'that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property.' And the ruling was given point by a citation of the power of the state over its wild game, which might be preserved for its own citizens. In other words, the ruling was given point by the *special power of the state over the subject-matter*,—a power which exists in the case at bar, as we have seen."

May it not in the case at bar, as in the above cases, be said that the treaty is made subject to the "*special power of the state*?" As a matter of fact, does not the treaty itself show this upon its face?

"ARTICLE VIII.

"The High Contracting Powers agree themselves to take, or *propose to their respective appropriate law-making bodies*, the necessary measures for insuring the execution of the present convention."

May this not be construed as obligating the Federal Government "to take" the necessary measures in such territory as it has, under the Constitution, the power "to take" measures for regulating the taking of wild game therein, and further obligating the Federal Government, *not "to take,"* but "*to propose*" to the "appropriate law-making bodies"—that is, the legislatures of the several states—the necessary measures for regulating the taking of wild game within the borders of the respective states wherein the states only have the power, under the Constitution, to take such measures?

The High Contracting Powers must be held to have known that the power of the Federal Government did not extend to the taking over of a trust exercised by the state in relation to the common property of its citizens, or the enactment of mere police regulations within the limits of a state; and the language of Article VIII seems to indicate that they both knew and acted upon this knowledge.

Such construction leaves both the treaty and the laws of Missouri intact and in force. It results in holding unconstitutional only an act of Congress which was not necessarily required by the treaty, and which, under the Constitution, Congress had no power to pass.

Respectfully submitted,

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B. HENRY ST. GEORGE TUCKER--LIMITATIONS ON TREATY POWER
(EXCERPTS)

LIMITATIONS ON THE
TREATY-MAKING POWER

UNDER THE CONSTITUTION OF THE
UNITED STATES

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LIMITATIONS ON THE TREATY-MAKING POWER

INTRODUCTION

§ 1. The object of these pages is to discuss the treaty-making power under the Constitution of the United States, and define its limitations. The broader question of the scope of treaties, their construction and binding effect, is a question of international law into which the author does not propose to intrude; this field has been so amply and ably filled that it would be useless to add to it, even did it come within the limits of a treatise of this character.

My object is to present in a simple and concrete form, in the discussion in these pages, not the general power of making treaties as applied to nations, nor what *ought to be* the full scope of such power in the United States, but what, under the Constitution of the United States, is the power of the United States to make and ratify binding treaties.

The past fifty years has witnessed a phenomenal growth of these United States, that is alike the surprise and wonder of the world, in material development, in the arts and sciences, in statecraft, and all sociological problems. The position of the United States to-day is second to no nation in the world. The elements of power, as seen in every field of development,

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have stimulated in the minds of many the ambition of placing the United States in the primacy of the great World Powers, and of giving them a seat at the diplomatic table of the assembled nations of the world, where the game of politics is played successfully, when proper alliances are made, and where with equal disaster, the game is played if mis-alliances are formed.

The warning of George Washington to the people of these United States against "entangling alliances" with foreign nations must not be forgotten, if we would fulfil our manifest destiny. America can have no higher or more exalted mission among the nations of the world than to work out successfully and to their fullest fruition the principles of civil and religious liberty first brought by our fathers to these shores in 1607 and planted on the banks of the River James by the Colony at Jamestown. When this shall have been successfully accomplished, the armaments of America that will exert the greatest influence in the control of the world will not be the dreadnoughts of her navy, nor the artillery of her battlements, but they will consist of those sturdy moral forces abiding with the people that uphold justice, maintain the cause of Freedom, defy tyranny and tyrants, exalt the sanctity of the law, national and international, proclaim the equality of opportunity to all, and in all things hasten the advancement of Righteousness and Peace throughout the length and breadth of this "Land of the Free and Home of the Brave."

Every patriotic American rejoices in the wonderful development of his country; in the accumulation of its wealth and its proper diffusion; in the equality of right accorded every citizen of the land; in the power to defend ourselves against the aggressions of power — domestic and foreign; and in the unlimited power for good to the whole world in the development of the principles of freedom as proclaimed in the Constitution of this Federal Republic.

Whatever of good shall come to the world from the development upon this Continent of republican ideas must come with

the recognition of the fact that this Government differs from those of the old world, and that we are here charged with the duty under our system of government of developing the maximum of freedom in thought, in speech, and in action in every citizen consistent with the same right in every other American citizen under a written constitution. Nor must we be led into error by assuming that what can be done by Great Britain or Germany or any of the great powers of the world can and should be done by us. Our Government has no parallel among the nations of the world. Our constitutional form of government, dual in character, recognizing the States and the Federal government as joint instruments in the development of all governmental powers, some of which are committed to the one and some to the other, each supreme in its sphere, each powerless in that of the other, is difficult of interpretation and unique among the nations of the earth.

By a critical examination of the provisions of the Constitution of the United States; in the interpretation thereof by the early and modern statesmen of the country; in the opinions of judges, State and Federal; and in the adjudicated cases in their bearing upon this question, we shall hope to eliminate the prevalent error of the "unlimited" and boundless scope of this power and establish what are the reasonable and constitutional "limitations on the treaty-making power" under the Constitution of the United States. *

CHAPTER I

VIEWS AND OPINIONS OF AUTHORS AND STATESMEN ON THE
TREATY POWER OF THE CONSTITUTION FROM OUR EARLY
HISTORY TO THE PRESENT TIME

§ 2. As preliminary to our discussion, it will be proper and profitable to present the views of statesmen and public men on different phases of this question, as expressed by them in public speeches, on the floor of Congress, or in works devoted to the discussion of constitutional questions. The true view of any question must exist independently of the convictions of any one man or set of men, but where many, who from their public experience, ability, and study, concur in one judgment as touching a subject, it must be admitted as a strong presumption in favor of the correctness of that view. With this end in view, it is proposed to cite the opinions of statesmen from the foundation of the Government down to the present time, in order to see whether there is a common ground in their expressed views which may be accepted if not as conclusive, at least as strongly persuasive of its correctness.

§ 3. Mr. Calhoun stands *primus inter pares* among those who have been called upon to construe the Constitution of the United States. His power of analysis, his intense earnestness, and his high personal character, point to him as one of the greatest of American statesmen.

In one place he says: ¹

"Although the treaty-making power is exclusively vested and without enumeration or specification, in the Government

¹ "Discourse on the Constitution and Government of the United States," Vol. I, p. 203.

of the United States, it is, nevertheless, subject to several important limitations. It is, in the first place, strictly limited to questions *inter alios*; that is, to questions between us and foreign powers which require negotiation to adjust them. All such clearly appertain to it. But to extend it beyond these, be the pretext what it may, would be to extend it beyond the allotted sphere, and thus a palpable violation of the Constitution. It is, in the next place, limited by all the provisions of the Constitution which inhibit certain acts from being done by the Government, or any of its departments; of which description there are many. It is also limited by such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary, of which a striking example is to be found in that which declares that 'no money shall be drawn from the Treasury but in consequence of appropriations to be made by law.' This not only imposes an important restriction on the power, but gives to Congress as the law making power, and to the House of Representatives as a portion of Congress, the right to withhold appropriations; and, thereby, an important control over the treaty-making power, whenever money is required to carry a treaty into effect; which is usually the case, especially in reference to those of much importance. *

"There still remains another and more important limitation, but of a more general and indefinite character. It can enter into no stipulation calculated to change the character of the Government; or to do that which can only be done by the Constitution-making power; or which is inconsistent with the nature and structure of the Government or the objects for which it was formed. Among which, it seems to be settled that it cannot change or alter the boundary of a State or cede any portion of its territory without its consent. Within these limits all questions which may arise between us and other powers, be the subject matter what it may, fall within the limits of the treaty-making power and may be adjusted by it."

§ 4. Judge St. George Tucker presents his views of the treaty-making power as follows: ¹

"In our constitution, there is no restriction as to the subjects of treaties, unless perhaps the guarantee of a republican form of government, and of protection from invasion, contained

¹ Tucker's Blackstone, Vol. I, Appendix, 333.

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in the fourth article, may be construed to impose such a restriction, in behalf of the several states, against the dismemberment of the federal republic.¹ But whether this restriction may extend to prevent the alienation by cession, of the western territory, not being a part of any state, may be somewhat more doubtful. The act of cession from Virginia militates, expressly, against such an alienation of that part of the western territory which was ceded by this state.² Nevertheless, it is said to have been in contemplation soon after the establishment of the federal government, to cede the right of pre-emption to the lands in that territory to the Indians, who were then supposed to be in treaty for the same with the crown of Great Britain. The president, who had not authorised any such article, and who is said to have disapproved of it, in submitting the treaty to the consideration of the senate, called their attention particularly to that part of it; in consequence of which it was rejected, though warmly supported in the senate, as has been said. If the power of making such a dismemberment be questionable at any rate, it is much more so, when it is recollected, that the constitution seems to have vested congress collectively, and not any one or two branches of it only, with the power to dispose of that territory.³ The effect of this extraordinary treaty, if it had been ratified by the senate and the president, may easily be conceived. Great Britain, at that time not a little disposed to enmity towards the United States, would no doubt have insisted upon such an acquisition of territory, made under the faith of a treaty between the United States and the Indians; and thus the United States might either have been deprived of their territory by an unconstitutional treaty, or involved in a war for its preservation, by the proceedings of a body, whose authority does not extend to a final decision upon a question, whether war be necessary and expedient. This shews the collision which may possibly arise between the several branches of the congress, in consequence of this modification of the treaty-making power. For, being entrusted to a branch of the congress only, without the possibility of control or check by the other branch, so far as respects the conclusion and ratification of any treaty whatsoever, it may well happen, at some time or other, that the president and senate may overstep the limits of their just authority,

¹ C. U. S. Art. 4, § 4.² L. V. Edi. 1794. C. 40.³ C. U. S. Art. 4, § 3.

and the house of representatives be so tenacious of their own constitutional rights, as not to yield to the obligations imposed upon them by a treaty, the terms of which they do not approve."

He further says:¹

"But, to return to the treaty-making-power; it appears to be somewhat extraordinary, that that branch of the federal government, who are by the constitution required to concur, in a declaration of war, before any such declaration can be made, should be wholly precluded from voting at all, upon a question of peace. . . . They are judges of the causes of war; of the existence of those causes; of the resources, and ability of the states to prosecute and support a war; of the expediency of applying those resources to the obtaining redress, or satisfaction for the injury received; in short, of every possible circumstance that can induce the nation to incur the hazard, or expence of a war: and yet, if through timidity, venality, or corruption, the president, and two thirds of a majority of the senate can be prevailed upon to relinquish the prosecution of the war, and conclude a treaty, the house of representatives have not power to prevent, or retard the measure; although it should appear to them, that the object for which the war hath been undertaken, hath not been attained, and that it was neither relinquished from necessity, or inability to prosecute it, with effect.

"These objections are not intended to extend to the agency which the president and senate may have in the formation of a treaty; nor to the principle that treaties with foreign nations should be regarded as a part of the supreme law of the land. . . . The honour and peace of the nation certainly require that its compacts should be duly observed, and carried into effect with perfect good faith. And though it may be the result of sound discretion to confide the formation of a treaty, in the first instance, to the president and senate, only; yet the safety of the nation seems to require that the final ratification of any compact, which is to form a part of the supreme law of the land, should, as well as other laws of the federal government, depend upon the concurrent approbation of every branch of the congress, before they acquire such a sanction as to become irrevocable, without the consent of a foreign nation; or without hazarding an imputation against the honour and faith of the nation, in the performance of its contracts.

¹ Tuckor's Blackstone, Vol. I, Appendix, 338.

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"It may not be improper here to add something on the subject of that part of the constitution, which declares that treaties made by the president and senate shall be a part of the supreme law of the land: acts of congress made pursuant to the powers delegated by the constitution are to be regarded in the same light. What then is the effect of a treaty made by the president and senate, some of the articles of which may contain stipulations on legislative objects, or such as are expressly vested in congress by the constitution, until congress shall make a law carrying them into effect? Is congress bound to carry such stipulations into effect, whether they approve or disapprove of them? Have they no negative, no discretion upon the subject? The answer seems to be, that it is in some respects, an inchoate act. It is the law of the land, and binding upon the nation in all its parts, except so far as relates to those stipulations. Its final fate, in case of refusal on the part of congress, to carry those stipulations into effect, would depend on the will of the other nation. If they were satisfied that the treaty should subsist, although some of the original conditions should not be fulfilled on our part, the whole, except those stipulations embracing legislative objects, might remain a treaty. But if the other nation chose not to be bound, they would be at liberty to say so, and the treaty would be defeated.¹ And this construction seems to be consonant with that resolution, of the house of representatives,² wherein they declare, 'That when a treaty stipulates regulations on any of the subjects submitted by the constitution to the power of congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by congress; and it is the constitutional right and duty of the house of representatives, in all such cases, to deliberate on the expediency, or in expediency, of carrying such treaty into effect, and to determine and act thereon, as in their judgment, may be most conducive to the public good.' A contrary construction would render the power of the president and senate paramount to that of the whole congress, even upon those subjects upon which every branch of congress is, by the constitution, required to deliberate.³ Let it be sup-

¹ Debates on the treaty-making power, p. 346.

² Resolution of the house of representatives, April 6, 1796.

³ Such a doctrine appears to have been strenuously advocated in congress, some years ago. See debates on the treaty-making power: March and April, 1796. Philadelphia, printed. 1796.

posed, for example, that the president and senate should stipulate by treaty with any foreign nation, that in case of war between that nation and any other, the United States should immediately declare war against that nation: Can it be supposed that such a treaty would be so far the law of the land, as to take from the house of representatives their constitutional right to deliberate on the expediency or in expediency of such a declaration of war, and to determine and act thereon, according to their own judgment?"

§ 5. Mr. Calhoun's views as to the supremacy of treaties are expressed as follows:¹

"Where two or more States form a common constitution and government, the authority of these, within the limits of the delegated powers, must, of necessity, be supreme, in reference to their respective separate constitutions and governments. Without this, there would be neither a common constitution and government, nor even a confederacy. The whole would be, in fact, a mere nullity. But this supremacy is not an absolute supremacy. It is limited in extent and degree. It does not extend beyond the delegated powers;—all others being reserved to the States and the people of the States. Beyond these the constitution is as destitute of authority and as powerless as a blank piece of paper; and the measures of the government mere acts of assumption. And, hence, the supremacy of laws and treaties is expressly restricted to such as are made in pursuance of the constitution, or under the authority of the United States; which can, in no case, extend beyond the delegated powers. There is, indeed, no power of the government without restriction, not even that, which is called the discretionary power of Congress. I refer to the grant which authorizes it to pass laws to carry into effect the powers expressly vested in it — or in the government of the United States, — or in any of its departments, or officers. This power, comprehensive as it is, is nevertheless, subject to two important restrictions; one, that the law must be necessary, — and the other, that it must be proper."

§ 6. Among the older commentators upon the Constitution, whose book was used as a text-book at West Point, for the in-

¹ "Works of John C. Calhoun," Edited by Richard K. Crallo (1888), Vol. I, page 252.

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struction of the young men of the country, is William Rawle of Philadelphia. In his work on the Constitution, page 66, he uses the following language:

"The most general terms are used in the Constitution. The powers of Congress in respect to making laws, we shall find, are laid under several restrictions. There are none in respect to treaties. . . . To define them in the Constitution would have been impossible, and therefore a general term could alone be made use of, which is, however, to be scrupulously confined to its legitimate interpretation. Whatever is wanting in an authority expressed must be sought for in principle, and to ascertain whether the execution of the treaty-making power can be supported we must carefully apply to it the principles of the Constitution, from which alone the power proceeds. . . .

"There is a variance in the words descriptive of laws and those of treaties. In the former it is said those which shall be made in pursuance of the Constitution, but treaties are described as having been made, or which shall be made, under the authority of the United States. The explanation is that at the time of adopting the Constitution, certain treaties existed, which had been made by Congress under the Confederation, the continuing obligations of which it was proper to declare. The words 'under the authority of the United States' were considered as extending equally to those previously made and to those which should subsequently be effected. But although the former could not be considered as made pursuant to a Constitution which was not then in existence, the latter would not be 'under the authority of the United States' unless they are conformable to its Constitution."

§ 7. Judge Story in his Commentaries on the Constitution, Section 1508, uses the following language,

"The power 'to make treaties' is by the Constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliances or succors; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other. But though the power is thus general and unrestricted, it is not to be so

construed as to destroy the fundamental laws of the state. A power given by the Constitution can not be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and can not supersede or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the Government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would destroy, what it was designed merely to fulfil, the will of the people. Whether there are any other restrictions necessarily growing out of the structure of the Government, will remain to be considered whenever the exigency shall arise."

§ 8. Mr. Webster, on the 27th of June, 1850, in a speech in the Senate on "California Public Lands and Boundaries,"¹ says:

"The Government of the United States holds no powers which it does not hold as powers as enumerated in the Constitution or as powers necessarily implied; and the same may be said of every State in the Union. The Constitution of each State prescribes definitely the powers that shall belong to the government of the State. But if these were a true source of argument in this case, the honorable member would find that this implication arising from sovereignty would just as naturally adhere to the Government of the United States as to that of the States. Certainly, many higher branches of sovereignty are in the Government of the United States. The United States Government makes war, raises armies, maintains navies, enters into alliances, makes treaties and coins money; none of which acts of sovereignty are performed by a State Government. Nevertheless, there are sovereign powers which the States do perform. They punish crimes, impose penalties, *regulate tenure of land*² and exercise a municipal sovereignty over it."

§ 9. Judge William A. Duer in his work entitled "Lectures on the Constitutional Jurisprudence of the United States"³ uses the following language:

¹ Webster's Works, Vol. V, 389.

² Author's italics.

³ Second Edition, p. 228.

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"More general and extensive terms, also, are used in vesting the power with respect to treaties than in conferring that relative to laws; and while the latter is laid under several restrictions, there are none imposed on the exercise of the former, notwithstanding it is committed to the President and Senate, in exclusion of the House of Representatives, and is executed through the instrumentality of agents delegated for that purpose. And although the President and Senate are thus invested with this high and exclusive control over all those subjects of negotiation with foreign powers which in their consequence may affect important domestic interests, yet it would have been impossible to have defined a power of this nature, and therefore, general terms only were used. These general expressions, however, ought strictly to be confined to their legitimate signification; and in order to ascertain whether the execution of the treaty-making powers can be supported in any given case, those principles of the Constitution from which the power proceeds should carefully be applied to it. The power must, indeed, be construed in subordination to the Constitution; and, however in its operation it may qualify, it cannot supersede or interfere with any other of its fundamental provisions, nor can it ever be so interpreted as to destroy other powers granted by that instrument. A treaty to change the organization of the Government, or annihilate its sovereignty, or overturn its republican form, or to deprive it of any of its constitutional powers, would be void; because it would defeat the will of the people, which it was designed to fulfill."

§ 10. Judge Cooley in his "Principles of Constitutional Law," page 117, says,

"The Constitution imposes no restriction upon this power (treaty-making power), but it is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the government or any of the States of its constitutional authority."

§ 11. Among the ablest modern commentators upon the Constitution, a devoted follower of Judge Story, an adopted American, is von Holst. In his "Constitutional Law of the United States,"¹ he uses the following language;

¹ p. 202 (Callaghan & Co.).

"As to the extent of the treaty-power the constitution says nothing, but it evidently cannot be unlimited. 'The power exists *only under the Constitution*,'¹ and every treaty-stipulation inconsistent with a provision of the constitution is therefore inadmissible and according to *constitutional law ipso facto null and void*.¹ Simple and self-evident as this principle is in theory, yet it may be very difficult under certain circumstances to decide whether or not it has been transgressed in fact. Indeed, the chief difficulty arises from the question of the relation the treaty-power of the president with the concurrence-power of the senate bears to the legislative power of congress. This question is answered by saying that these powers must be coördinate, for treaties like laws are 'sovereign acts,' which differ from laws only in form and in the organs by which the sovereign will expresses itself. It follows from this principle that a law can be repealed by a treaty (*Foster v. Neilson*, 2 Peters, 253) as well as a treaty by a law (*The Cherokee Tobacco*, 11 Wallace, 616). If a treaty and a law are in opposition, their respective dates must decide whether the one or the other is to be regarded as repealed (*Foster v. Neilson*, 2 Peters, 253, 314; *Doe v. Braden*, 16 Howard, 635 . . .). Neither the principle nor the correctness of these conclusions from it can well be disputed, and they are at any rate valid constitutional law. But in spite of this it must be admitted that the doctrine has its doubtful side, both in theory and practice. It must be called at least an anomaly, that by the *ex parte* action of the president and two-thirds of the senators present (who may be only a minority of the whole senate), a law can be repealed, the passage of which required the concurrence of the house of representatives with the senate and president or a two-thirds majority of each house of congress. The repeal of a treaty by the enactment of a law may, moreover, lead the more easily to serious consequences, because the incompatibility of the law and of the treaty may not be so clearly manifest that the foreign power concerned will immediately take notice of the law. It is in no wise inconceivable that congress itself might know nothing of what it had done, so that only after a long time would the fact be established by judicial decision, that in this indirect manner a treaty was overthrown, the repeal of which had not been contemplated by either of the two contracting parties.

¹ Author's italics.

§§ 11-13 LIMITATIONS ON THE TREATY-MAKING POWER

"On still another side this question of the direct relation between the treaty-power and the legislative-power makes it difficult to fix the limits of the treaty-power. It is certain that no authority granted by the constitution to any of the factors of government can be withdrawn from it by treaty. For that would be a change of the constitution and, as such, unconstitutional. But congress may be bound by a treaty not to exercise in a certain way a power belonging to it, although it might exercise it in that way if not bound by the treaty. The freedom of action of the house of representatives can thus easily be restricted by a treaty to such a degree that the restriction must be admitted to be a violation of the constitution, even if not strictly of its letter, yet still of its spirit. Thus, for instance, the framers of the constitution certainly did not wish that duties should be fixed in a way repugnant to the views of the house of representatives, and yet this might be brought about at any moment by a commercial treaty. Of course it must not be inferred that in general there should be no commercial treaties. But Daniel Webster was certainly right in advising his countrymen to consider carefully before beginning to handle questions of duties in connection with treaties."

§ 12. John Randolph Tucker in his work on the Constitution,¹ uses the following language:

"It is from the fundamental laws of each State that we must learn where resides the authority that is capable of contracting with validity in the name of a State "

and concludes as follows:

"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. We suggest a further limitation: A treaty cannot compel any department of the Government to do what the Constitution submits to its exclusive and absolute will. On these questions the true canon of construction, that the treaty-making power in its seeming absoluteness and unconditional extent, is confronted with equally absolute and unconditioned authority vested in the judiciary."

§ 13. Mr. Wharton, in his "International Law Digest," Vol. II, paragraph 131a, quoting Dr. Ernest Meier, Professor

¹ Vol. II, p. 725.

der Rechte an der Universität Halle, Leipzig, 1874, "Ueber den Abschluss von Staatsverträgen," says:

"That a treaty cannot invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no writer in our own tongue.

"Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the 'treaty-making power' be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives. The Constitution gives Congress the control of the Army. Participation in this control would be snatched from the House of Representatives by a treaty with a foreign power by which the United States would bind itself to keep in the field an army of a particular size. The Constitution gives Congress the right of declaring war; this right would be illusory if the President and Senate could by a treaty launch the country into a foreign war. The power of borrowing money on the credit of the United States resides in Congress; this power would cease to exist if the President and Senate could by treaty bind the country to the borrowing of foreign funds. By the Constitution 'no money shall be drawn from the Treasury, but in consequence of appropriations made by law'; but this limitation would cease to exist if by a treaty the United States could be bound to pay money to a foreign power. . . . Congress would cease to be the law-making-power as is prescribed by the Constitution; the law-making-power would be the President and the Senate. Such a condition would become the more dangerous from the fact that treaties so adopted being on this particular hypothesis superior to legislation, would continue in force until superseded by other treaties. Not only, therefore, would a Congress consisting of two Houses be made to give way to an oligarchy of President and Senate, but the decrees of this oligarchy when once made, could only be changed by concurrence of President and of Senatorial majority of two-thirds."

§ 14 LIMITATIONS ON THE TREATY-MAKING POWER

§ 14. John Randolph Tucker, in a speech delivered in the House of Representatives, March 22, 1882, on Chinese Immigration used the following language, discussing the treaty-making power;

"This treaty with China has not so provided; and it has been very much discussed, from the year 1796 down to the present time, whether the treaty-making power can divest Congress of the authority which it has to determine any question which is expressly delegated to it by the Constitution. It is a question of great consequence in preserving the balances of power created by the Constitution; and I will be pardoned for giving it a preliminary consideration. . . .

"The question is not whether Congress can annul a valid treaty, but is a treaty valid and binding on the United States which divests Congress of its Constitutional functions without its sanction and consent? Congress may not by its dissent annul a valid treaty, but is not its assent essential to the validity of a treaty divesting it of its constitutional power?

"The operation which a treaty can have may be from its inherent force, or such as may be necessary in aid of its provisions. All that is necessary in aid of its provisions is dependent on the action of Congress and cannot operate *proprio vigore*, but must depend for its operative force upon the concurrent action of Congress.

"But as to its provisions, which may operate without the aid of Congressional action, it is argued the power of Congress is excluded absolutely and entirely.

"Is this argument sound? Suppose a treaty with Great Britain should provide that the Government of the United States should never lay any duty on articles imported from that country, or that Congress should never borrow money, or should never naturalize an alien, or should not coin money, or raise armies, or provide a navy, or establish post-offices, &c. Can it be held that the President and Senate may by treaty thus divest Congress of its constitutional authority or relieve it of its constitutional duty to do any of these things? If so, then the treaty-making power may amend, alter, and destroy the Constitution and hold us bound in good faith to submit to this claim of a foreign power conferred and sanctioned by a treaty. This cannot be true. It is absurd. These express powers to Congress are limitations on the general power to make treaties.

"The general power to make treaties vested in the President and Senate is met by a specific grant of power to do certain things above referred to. Shall the general authority be limited by the specific grant of power to Congress, or the latter yield to and be submerged by the former? How can both stand in harmony? Clearly thus: The general power to make treaties, to establish the relation of contract between the United States and a foreign country, is for the executive branch. Negotiation of terms of a treaty is for the President and Senate. But before these terms can deprive Congress of its constitutional functions its consent must be obtained; and while Congress is not a part of the treaty-making department, neither are its legislative functions any part of the treaty-making department; and both must therefore concur in the stipulations of the treaty before it can be 'a treaty made under the authority of the United States,' which are the terms used to make any treaty the supreme law of the land (Constitution, Article 6, clause 2). It must pass a law as 'necessary and proper for carrying into effect this power' to make treaties, 'vested in another department of the Government of the United States.'

"This construction of the Constitution makes it harmonious. The contrary construction would give to the President and Senate the power by treaty to emasculate Congress, to strip it of its power to perform its duties to the people, and would give authority to the treaty-making department by compact with a foreign foe to destroy the Constitution.

"The same reasoning applies to a treaty which regulates commerce, in which, as I shall hereafter show, is included the power to regulate, limit, and forbid the migration of aliens to this country. Take another class of necessary limitations on the treaty-making power. Could a treaty alienate a part of the territory of the Union, when Congress has the express power to dispose of it? Or could a treaty give one of the States to a foreign power? Or could one of the States by treaty be surrendered to Great Britain as a Botany Bay for its convicts, an asylum for its paupers, or a hospital for its diseased and insane population?

"And the reason of the construction for which I contend will readily appear from a consideration of the balances of the Constitution.

"A law to be operative must have the concurrence of a ma-

§§ 14-15 LIMITATIONS ON THE TREATY-MAKING POWER

majority of the people of the States represented in this House, of a majority of the Legislatures of the States represented in the Senate, and the approval of the President, representing all the States and the people of the States. The requisition of these concurrent voices of the States and people is a protection to them against injurious action by the Government. Each is a check upon inconsiderate action by the others.

"But how as to the treaty power? The President secretly negotiates, secretly proposes a treaty to the Senate for ratification, and the Senate deliberates with closed doors upon its ratification. Did the Constitution intend to give such power, as is claimed over the Constitutional functions of Congress, to the President and Senate acting in secret, and properly so in many cases?

. . . From this review, I feel justified in holding that if any treaty seeks to bind the United States to a foreign country in respect to the functional powers of Congress we are not open to a charge of bad faith if Congress refuses to sanction a divesture of its constitutional authority to deal with any subject intrusted to it by specifically granted powers in the Constitution of the United States."

§ 15. Judge Cooley in his "Constitutional Limitations,"¹ speaking of the treaty-making power says:

"It is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country or robs a department of the government or of any of the States of their constitutional authority."

And in the *Forum*, June 1893, page 397, the same distinguished author says:

"But though no limitations are laid upon the power in the National Constitution, some exist in the very nature of things which the treaty-making power must be expected under all circumstances to respect and observe. We say this, having in mind only what we suppose to be a general rule applicable whenever the extent of the treaty-making authority of any country comes in question; all the conditions under which it has come into existence are to be considered; the racial and other peculiarities of the people; what the country is and its situation; the nature of established institutions, and so on,

¹ p. 103.

for all these are in mind when the authority is created, and in some sense are of its substance, whatever may be the words under which it is expressed. . . . Then the treaty-making power, whatever be the nature of the government, if to be exercised by any subordinate of the sovereign and not by the sovereign directly, must not set aside or disregard any authoritative expression of the sovereign will, and it must not do acts or enter into negotiations that tend to undermine or overturn any existing institution of the country, or to change in any particular the established government. . . . When a treaty is said to be the supreme law, it is nevertheless to be understood that the Constitution, which is the highest expression of sovereign will and the authoritative representative of sovereign power in the nation, in fixing limitations upon the exercise of authority under it in regard to the subjects above indicated and many others, restrains the treaty-making power quite as much as any other. If it did not, and any treaty entered into in due form was in itself necessarily supreme law, a State might possibly by the force of it be set off from the Union to another nation, or the government might gradually and imperceptibly be overturned through a line of precedents constituting what at the time were perhaps not seen to be encroachments."

§ 16. Alexander Hamilton, writing to General Washington July 9, 1795, says:

"A treaty cannot be made which alters the Constitution of the country, or which infringes any express exceptions to the power of the Constitution of the United States. But it is difficult to assign any other bounds to the power."¹

§ 17. Professor Thayer,² in a note says:

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States."³ It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the

¹ Hamilton's Works, Vol. IV, p. 342.

² "Cases on Constitutional Law," Vol. I, p. 373.

³ Author's italics.

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territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

§ 18. Mr. Blaine, when Secretary of State, was called upon to consider this question in relation to the Chinese question. A letter of his of March 25th, 1881, on this subject, to Chen Lan Pin, the Chinese Ambassador, is of great force, and is fully quoted hereafter.¹

§ 19. The following letter is of interest, bearing also on this subject:

MR. HAY TO MR. TOWER²

"No. 1509.

"DEPARTMENT OF STATE,
WASHINGTON, July 19, 1899.

"Sir:

"Referring to previous correspondence in regard to legislation enacted or proposed to be enacted in various States of the Union unfavorable to foreign insurance companies, and with reference particularly to the suggested negotiation of a treaty between the United States and Great Britain on the subject, with the view of averting the injury with which British insurance companies are threatened by discriminatory legislation on the part of several of the United States, I have the honor to say that the negotiation of such treaty would probably be futile on account of the many difficulties and obstacles which it would be likely to encounter from the indisposition of the people of the United States to suffer encroachment upon the ordinary and constitutional exercise of the legislative functions of the respective States by the making of treaties which are passed on by only one branch of the Federal Congress but which have the force of the supreme law. The fact that such treaties were made with Switzerland and Belgium could hardly be considered as a precedent for such enactment of law in the form of a treaty with nations having the great commercial interests of Great Britain. However much I might be pleased to respond affirmatively to your request, yet in the light of all

¹ See Chapter IX, p. 252.

² *Foreign Relations of the U. S. 1899*, p. 346.

the circumstances and of the vigilance with which any apparently important invasion of the rights of the States to regulate their own domestic concerns is guarded against, I am persuaded that such treaty, if negotiated, would fail of ratification by the Senate.

"For these reasons the proposed negotiation would, in my judgment, be fruitless, even if such treaty could be agreed upon and submitted to the Senate.

"I have etc.,

"JOHN HAY."

§ 20. Professor Amos S. Hershey, in an article discussing "The Japanese School Question and the Treaty-making Power," closes his discussion in the following words:

"The writer, although by no means a strict constructionist, does not believe that the federal government has the right, by treaty or otherwise, to encroach upon the police power or reserved rights of the States to the extent of directing or controlling their public school systems. If there are any constitutional limitations upon the treaty-making power, if the States retain any autonomy whatsoever, they surely preserve a right to the exclusive control of the schools which they maintain out of their resources. What greater trespass upon the province of self-government, what more serious violation of fundamental rights can be imagined than federal interference with a State's management of its own schools? If our federal government should barter away such fundamental rights as these, and the courts hold such action constitutional, then the double structure of State and federal government which our fathers reared will crumble into ruins, and a new centralized edifice will take its place in which the States will be reduced to mere provinces or administrative units."

§ 21. Judge Shackelford Miller delivered recently a very able address before the Jefferson School of Law of the city of Louisville on the Treaty-making Power under the Constitution. It is undoubtedly one of the most thoroughly digested articles that has appeared on the subject. In the course of his address he uses the following language:

"The text of a sound treatise on any subject of law is based upon and confined by the decisions of the courts upon that

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subject. I have followed this historical treatment of the treaty-making power from the Constitutional Convention of 1787, to the present time, purposely omitting any direct mention of the decisions in order that we might see what effect those decisions had from time to time upon the definitions and descriptions of the power as given by subsequent writers. The result is interesting and peculiar. In 1802 Tucker, the first author, cited no authority except the text of the Constitution; thirty years later Story cited Tucker, Rawle and Jefferson; while in 1880 Cooley cites Tucker and Story, as herein quoted, in support of his text. The reason for this is plain, since the judicial decisions have been only so many applications of the general rule to specific statements of fact. For it is readily seen that while many of the decisions contain broad general statements to the effect that treaties are the supreme law of the land, there is always the accompanying qualification that it must be a constitutional treaty in order to be so considered.

"It is clear that there may be an unconstitutional treaty, just as there may be an unconstitutional act of Congress. This point is well illustrated by the treaty negotiated in 1854 at Caracas by the United States minister and the Venezuelan Government, which provided, in its twenty-fifth article, that in case a citizen of either country should accept a commission in the service of an enemy at war with the other country he should be deemed a pirate and so punished. Mr. Marcy, Secretary of State, promptly repudiated the treaty, which was satisfactory in other respects, upon the ground that the Constitution provided that Congress should define the crime of piracy and its punishment, and that it could not be made the subject of a treaty. If the treaty had been ratified, there can be no doubt that the courts would have sustained Mr. Marcy's view."

§ 22. Senator Isidor Rayner, on the 12th day of December, 1906, delivered a speech in the Senate of the United States, "In support of his resolutions holding that the educational institutions of the States cannot be interfered with by the Federal Government in the exercise of its treaty-making power." In the course of his speech he used the following language:¹

¹ 59th Congress, 41 Congressional Record, No. 8, p. 281.

"I plant myself firmly and unalterably upon the proposition that we can make no treaty that violates any of the provisions of the Constitution of the United States, that the treaty-making power in the sixth Article must be construed *in pari materia* with all the other provisions contained in the Constitution, and if the treaty comes in conflict with any of the limitations of the instrument the treaty must yield and the Constitution prevail.

"As a corollary of this proposition I plant myself upon the doctrine that any treaty that violates Article X of the Constitution and infringes upon the reserved rights of the States which have not been delegated to the General Government, and embraces subjects that belong to the States, and that are not necessary to carry out the purposes of the Government as defined in the Constitution, is *ultra vires* and not within the capacity of the Government to make. . . . There are two separate schools of construction upon the subject at issue. These schools are professional schools and schools of commentators and text writers upon the Constitution, and it is not entirely accurate to designate them as the respective advocates of national and States' rights systems.

"One of these schools claims that the treaty-making power is an inherent element of sovereignty, and though it is a conferred power in the Constitution it would exist as an essential attribute of this Government without delegation, and that when it is once delegated it need not derive its authority from the Constitution, and that whenever it comes in conflict with the provisions of a State law or a State constitution, by the terms of Article VI of the Constitution, the treaty prevails. Some of the adherents of this school have proceeded to the most unfortunate limits in their construction of the treaty-making power, and have held that this power is superior to the Constitution and is not in any manner governed by its inhibitions or limitations.

"The second school stand upon the doctrine that the treaty-making power exists for the purpose of carrying out the purposes and objects of this Government as prescribed and defined by the Constitution, and that no treaty is valid that violates the Constitution, or that under its provisions surrenders the rights reserved and belonging to the States.

"I am a disciple of the second school, not only as a party man, but as a student of Constitutional history, and I proceed now to give the reasons for the faith that is in me."

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§ 23. William C. Morey, Professor of History and Political Science in the University of Rochester, in 1909 published a paper on the "Treaty-making Power and Legislative Authority of the States."¹ In concluding his paper he says:

"We may conclude that our present federal system is entirely adequate to meet the dangers arising from any apparent conflict between a treaty and a State law. The Constitution itself is the ultimate and only standard by which the validity of a State law as well as that of a treaty must be determined. There cannot, therefore, in the nature of our constitutional system, be any legal antagonism between the treaty-making power of the Federal government and the legislative authority of a State. They are, in fact, the co-ordinate and harmonious functions of one body-politic. And apparent conflict between them is due to a misconception of their proper relations, either on the part of the Federal government or on the part of the State authorities. Any such a misconception need not long exist, since the legitimate province of both is capable of being determined by a supreme judicial tribunal. The united sovereignty of the nation is not destroyed by the distribution of its powers. That sovereignty remains undiminished in spite of the delegation of certain powers to the Federal government and the reservation of certain powers to the States; and is capable of meeting all the complex demands of a new experience, either by a liberal interpretation of its fundamental law, or as a last resort by an amendment to the Constitution itself."

§ 24. Another distinguished author says:²

"What limits does it place upon the treaty-making power? None whatever. There is no limit to the exercise of this power, when reduced to any particular case, but it is to the form of executing the power which is a simple concurrence of two thirds of the Senate. I do not say that there is no check or restriction upon the functions of the Government, for there is this limit, that it cannot be exercised in the destruction of or in opposition to any known Constitutional right or power, and must be subordinate to every other right recognized. But if the exercise of the treaty-making power does not conflict

¹ Important discussions, *Post Express Specials*, Series B, No. 1.

² William Archer Cocke's "Constitutional History of the United States," p. 235.

with some right or come in opposition with some class of powers specified in the Constitution, there is no restriction upon its employment whenever used in accordance with the form of the Constitution."

§ 25. In an address before the New York State Bar Association, at Albany, in 1903, Mr. Heman W. Morris, of Rochester, New York,¹ discusses "The powers of Congress over Treaties," and in the course of his address he discusses the Chinese Exclusion Cases,² involving the Act of 1888, which was an amendment to a former Act forbidding the return to this country of Chinese lawfully residing here but who had temporarily left. He says:

"It was conceded that both the Exclusion Act of 1888 and the Deportation Act of 1892 were in contravention of the express stipulations of the Burlingame treaty and the supplementary treaty of 1880, but the court affirmed the doctrine squarely that treaties are of no greater force as the supreme law of the land than are Acts of Congress.

"A treaty, it was said, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the powers of Congress, it can be deemed, in that particular, only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. Congress may, as with an ordinary statute, modify its provisions, or supersede them altogether. In either case, the last expression of the sovereign will must control. . . .

"In the view of the Court, if the legislative department sees fit for any reason to refuse, upon a subject within its control, compliance with the stipulations of a treaty, or to abrogate them entirely, it is not for the courts to call in question the validity or wisdom of its action. If the nation with which the treaty is made objects to the legislation, it may complain to the executive head of our government, and take such measures as it may deem advisable for its interests, even to a declaration of war.

¹ Am. Law Rev. Vol. 37, p. 363.

² 130 U. S. 581, 32 L. ed. 1068, 9 S. C. 645.

§§ 25-26 LIMITATIONS ON THE TREATY-MAKING POWER

"But the power of Congress, over a subject within its jurisdiction, can neither be taken away nor impaired by any treaty. Inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President, while they continue unrepealed; and inasmuch as the power of repealing these municipal laws must reside somewhere, and no body other than Congress possesses it, the legislative power is applicable to such laws whenever they relate to subjects which the Constitution has placed under that power. . . .

"A treaty may be simply a compact between two or more States in their sovereign or corporate capacities; of this class are treaties of alliance, or it may operate mainly upon the rights of individuals within the respective jurisdictions of the contracting parties, in which case it is like a statute, and capable of enforcement by the courts in the same way. Most treaties are of this kind. Of course, behind every treaty is the guaranty of the State that its provisions shall be scrupulously enforced within its own jurisdiction for the benefit and protection of the citizens of the other State.

"Now in so far as a treaty between the United States and a foreign nation can have effect as a law within this country, it is subject to be modified or amended by an Act of Congress. So much was necessarily involved in, and decided by the Supreme Court, in the Chinese Exclusion cases. What power Congress has, if any, over a treaty, regarded merely as a compact between this nation and another, was not involved in those cases, and, so far as I am aware, has never been the subject of judicial consideration. Indeed, such a question would involve matters so purely political in their nature, belonging so exclusively to the political departments of the government, that the courts might well decline to consider it for want of jurisdiction." (pp. 375-377.)

§ 26. Mr. Marcy has said:¹

"The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other. It would be difficult to find a reputable lawyer in this country who would not yield a ready assent to this proposition. Mr. Dillon's

¹ Mr. Marcy, Secretary of State, to Mr. Mason, Minister to France, Sept. 11, 1854. MS. Inst. France XV, 210. Moore's Int. Law Dig., Vol. V, p. 167.

counsel admitted it in his argument for the consul's privilege before the court in California. The Sixth Amendment to the United States Constitution gives, in general and comprehensive language, the right to a defendant in criminal prosecutions to have compulsory process to procure the attendance of witnesses in his favor. Neither Congress nor the treaty-making power are competent to put any restriction on this constitutional provision. There was, however, at the time of its adoption, some limit to the range of its operation. It did not give to such a defendant the right to have compulsory process against all persons whatever, but only against such as were subject to subpoena process at that time, such as might by existing law be witnesses. There were then persons and classes of persons who were not thus subject to that process, who, by privileges and mental disqualifications, could not be made witnesses and this constitutional provision did not confer the right on the defendant to have compulsory process against them. As the law of evidence stood when the Constitution went into effect, ambassadors and ministers could not be served with compulsory process to appear as witnesses, and the clause in the Constitution referred to did not give to the defendant in criminal prosecutions the right to compel their attendance in court. But what was the case in this respect as to consuls? They had not the diplomatic privileges of ambassadors and ministers. After the adoption of the Constitution the defendant in a criminal prosecution had the right to compulsory process to bring into court as a witness in his behalf any foreign consul whatsoever. If he then had it, and has it not now, when and how has this constitutional right been taken from him? Congress could not take it away, neither could the treaty-making power, for it is not within the competence of either to modify or restrict the operation of any provision of the Constitution of the United States."

And again he says:¹

"It is not, as you will perceive by examining Mr. Drouyn de L'Huys's dispatch to the Count de Sartiges, the application of the 'principle' to the particular case of M. Dillon, which is to be disavowed, but the broad and general proposition that

¹ Mr. Marcy, Secretary of State, to Mr. Mason, Minister to France, Jan. 18, 1855. MS. Inst. France XV, 249. Moore's Int. Law Dig., Vol. V, p. 168.

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the Constitution is paramount in authority to any treaty or convention made by this government. This principle, the President directs me to say, he can not disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was the paramount law."

§ 27. At another time he wrote: ¹

"In reply, the undersigned hastens to inform Mr. Aspuruá that it is believed not to be competent to the treaty-making power of the United States to enter into such an engagement as that contained in the twenty-fifth article of the convention concluded at Caracas on the 20th day of September by the plenipotentiaries of Venezuela and the United States, viz:

"'Whenever one of the contracting parties shall be engaged in war with another State, no citizen of the other contracting party shall accept a commission or letter of marque for the purpose of assisting or co-operating hostilely with the said enemy against the said party so at war, under the pain of being considered as a pirate.'

"The Constitution of the United States provides that Congress shall 'define and punish piracies and felonies committed on the high seas.' Although several conventions have been made by this Government with foreign Governments, some of which still continue in force, containing in substance, the stipulation just quoted, they were evidently contracted by an oversight of one of the provisions of the Constitution — the supreme law of this country. The President, entertaining this opinion, cannot consent to transmit the convention negotiated by Mr. Eames, which in all other respects meets with his approval, to the Senate for ratification without presenting to that body his objections to the article aforementioned."

§ 28. Mr. Wirt, as Attorney General of the United States, gave the following opinion: ²

"An alien can inherit, carry away, and alienate personal property, without being liable to any jus detractus; but not real estate.

¹ Mr. Marcy, Secretary of State, to Mr. Aspuruá (International Law Digest, Wharton, Vol. II, Sec. 138, p. 68).

² Opinions of Attorneys General, Vol. I, p. 275.

"RICHMOND, July 30, 1819.

"Sir:

"I have received at this place your communication of the 23d instant, presenting for my opinion certain questions submitted to you by Mr. Gahn, the Swedish chargé d'affaires to the United States, to which I hasten to answer.

"An alien can, in the United States, inherit, with the faculty of carrying away and alienating, every species of *personal* property, without being liable to any *jus detractus*. But he cannot inherit real or fast property at all; nor is there any power in the general government, as I conceive, to alter, either by law or treaty, the provisions of the particular States in this respect. The 6th article of the old treaty of amity and commerce, between the United States and Sweden, is understood as applying to personal property only.

"I have the honor to be, &c.,

"WM. WIRT.

"To the Secretary of State."

§ 29. John Page, of Virginia, friend of Washington, a Revolutionary soldier, and afterwards governor of Virginia, once said:

"I may agree that a treaty is necessary to establish a commercial intercourse between two nations to their mutual advantage and satisfaction, but I must affirm that as that treaty would be a commercial regulation, and as Congress is expressly empowered by the Constitution to regulate commerce, whenever such treaty shall be made between the United States and any other nation, Congress must either direct that the negotiation be commenced upon conditions approved or sanction the ratification of such treaty by some act showing that the regulation of commerce by the treaty was made by the authority of Congress, in conformity to the Constitution. Besides, if the President and Senate can regulate the commerce of the United States with one nation, they can with all nations, and if they can with all, what nation can there be with whom Congress can regulate commerce? This argument must therefore fall to the ground. We are told, however, that the treaty-making power, from its nature, is competent to all the objects and is not to be controlled or checked by the House. . . .

"If it be true then, can the President repeal, as he has by the treaty, the laws of Congress, although by the Constitution

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he cannot negative them? He can oblige Congress to levy taxes; can withdraw impost and tonnage from their reach; prohibit the exportation of sundry articles of produce of the United States, although the Constitution forbids the Senate and the House of Representatives concurring to lay the smallest duty on the exportation of any article; he can create offices and annex salaries thereto, destroy the rights of the House to provoke war; in short he can do anything: but this we are sworn to deny. The absurdity of that construction must be evident, and *the recollections of our oaths to support the Constitution*, of which we have been reminded, must force us to revolt at the thoughts of adopting such a monstrous construction of the Constitution."¹

§ 30. Henry Clay, in 1820, said, in the House of Representatives, speaking of the Treaty with Spain relating to the boundary between Louisiana and Mexico:

"The Constitution of the United States has not defined the precise limits of that power, because from the nature of it they could not be presented. It appears to me, however, that no safe American statesman will assign to it a boundless scope. I presume, for example, that *there is a functionary without limits*. The first great bound to the power in question, I apprehend, is that no treaty can constitutionally transcend the very object and purpose of the Government itself. I think also that wherever there are specified grants of power to Congress they limit and control or, I would rather say, modify the exercise of the general grant of the treaty-making power upon a principle which is familiar to everyone. . . . But if the concurrence of this house be not necessary in the cases asserted, if there be no restriction upon the power I am considering, it may draw to itself and absorb the whole of the power of the Government. To contract alliances, to stipulate for raising troops to be employed in a common war about to be waged, to grant subsidies, even to introduce foreign troops within the bosom of the country, are not infrequent instances of the exercise of this power; and if in all such cases the honor and faith of the Nation are committed by the exclusive act of the President and Senate, *the melancholy duty alone might be left to Congress of recording the ruin of the Republic.*"²

¹ Annals of Congress, Vol. V, 562.

² Author's italics.

§ 31. Mr. Jefferson expressed his views on this subject at various times and on different phases of it. In his "Manual of Parliamentary Practice,"¹ speaking of treaties, he used the following language:

"By the Constitution of the United States this department of legislature is confined to two branches only of the ordinary legislature; the President originating and the Senate having a negative. To what subject this power extends, has not been defined in detail by the Constitution, nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract, or it would be a mere nullity, *res inter alios acta*. (2) By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty and cannot be otherwise regulated. (3) It must have meant to except out of these *the rights reserved to the States*,² for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way. (4) And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some, on the ground that it would leave very little for the treaty power to work on. The less the better, say others."

And again, on March 13, 1816, writing of Washington's real attitude on the question between himself and the House of Representatives, in 1796, and also indicating his own, says:

"A writer in the National Intelligencer of February 24 who signs himself B., is endeavoring to shelter himself under the cloak of Gen. Washington, in the present enterprise of the Senate to wrest from the House of Representatives the power, given them by the Constitution, of participating with the Senate in the establishment and continuance of laws on specified subjects. This aim is by associating an Indian chief, or foreign government, in form of a treaty, to possess themselves of the power of repealing laws becoming obnoxious to them, without the assent of the third branch, although that assent was necessary to make it a law. We are then to depend for the secure possession of our laws, not on our immediate Repre-

¹ p. 186.

² Author's italics.

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sentatives chosen by ourselves, and amenable to ourselves every other year, but on Senators chosen by the Legislatures, amenable to them only, and that but at intervals of six years, which is nearly the common estimate for a term for life. *But no act of that sainted worthy,*¹ no thought of General Washington, ever countenanced a change of our Constitution so vital as would be the rendering insignificant the popular, and giving to the aristocratical branch of our Government the power of depriving us of our laws."²

In November, 1795, Mr. Jefferson, in a letter to Mr. Madison, speaking of John Marshall, said:³

"His doctrine of the whole commercial part of the treaty (and he might have added the whole unconstitutional part of it) rests in the power of the H. of R. is certainly the true doctrine, and as the articles which stipulate what requires the consent of the three branches of the Legislature must be referred to the H. of R. for their concurrence, so they, being free agents, may approve or reject them, either by a vote declaring that, or by refusing to pass acts."

§ 32. Richard Henry Lee, the Revolutionary general and a distinguished writer of that time, when the Constitution was under consideration by the States for ratification, writing over the title of "The Federal Farmer," said:

"On a fair construction of the Constitution, I think the Legislature has a proper control over the President and Senate, in settling commercial treaties. By one article 'the Legislature shall have power to regulate commerce with foreign nations,' etc., and by another article the President, with the advice and consent of two-thirds of the Senate, shall have power to make treaties. These clauses must be considered together: and we ought never to make one part of the same instrument contradict another, if it can be avoided by any reasonable construction. By the first recital clause the Legislature has the power, that is, as I understand it, the sole power — to regulate commerce with foreign nations or to make all the rules

¹ Author's italics.

² "Memorial Edition of Writings of Thomas Jefferson," Vol. XIV, 442.

³ Ford's "Jefferson," Vol. VII, p. 33.

and regulations respecting trade and commerce between our citizens and foreigners. By the second recital clause the President and Senate have power generally to make treaties. There are several kinds of treaties, as treaties of commerce or peace, of alliance, etc. I think the words 'to make treaties' may be consistently construed, and yet so as it shall be left to the Legislature to confirm commercial treaties. They are in their nature and operation very distinct from treaties of peace and of alliance. The latter generally require secrecy. But it is but very seldom they interfere with the laws and internal police of the country, and operate immediately on persons or property, especially in commercial towns — they have in Great Britain usually been confirmed by Parliament. They consist of rules and regulations respecting commerce; and to regulate commerce, or to make regulations respecting commerce, the Federal Legislature, by the Constitution, has the power. I do not see that any commercial regulation can be made in treaties that will not infringe upon this power in the Legislature. Therefore, I infer that the true construction is that the President and Senate shall make treaties, but all commercial treaties shall be subject to be confirmed by the Legislature. This construction will render the clauses consistent, and make the powers of the President and Senate respecting treaties much less exceptional."¹

§ 33. Mr. Arthur English, in a letter to Hon. James E. Martine, Congressional Record, June 9, 1914, page 10929, says on the subject of the relative powers in different nations to make treaties:

"There is even another ground for holding this Treaty to be invalid and that is the lack of power in the President and Senate and the King of Great Britain to deprive the American people of a right which they own. Whence this power to grant any interests of the country without compensation? It is certainly not given by the Constitution. In England for an ambassador to agree to do what is beyond his authority is ground for impeachment, and it was held even by Washington's friends that he might be impeached if he went beyond his authority in agreeing to the Jay treaty with England.

¹"Letters of Richard Henry Lee," published by Thomas Greenleaf, New York, in 1787. Also found in *Annals of Congress*, Vol. V, 581.

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"What say the writers of despotic countries on this subject? Martin (L. U. Ch. 1, Sec. 3, p. 49) says:

"'Anything that has been promised by the chief or his agent beyond the limits of the authority with which the State has intrusted him is at most no more than a simple promise (*sponsio*) which only obliges the promisor to use his endeavors to produce the ratification.'"

"Again he says that:

"'Even the stipulation of a monarch, though he should be absolute, can not be valid if it militates against the fundamental law of the State unless ratified by the nation.'

"Fiore, in his *Volkerecht*, section 98, says: 'All treaties are to be looked upon as null and void, which are in any way opposed to the development of the activities of a nation, or which hinder the exercise of its own natural rights.'

"He after declares to the same effect.

"Vattel (2nd Book, Ch. 22, p. 298) says: 'A treaty pernicious to the State is null and not obligatory, no conductor of the nation having power to make such treaties. The nation itself cannot enter into engagements contrary to its indispensable obligations. In the year of 1506 the States General of the Kingdom of France, assembled at Tours, engaged Louis XII to break the Treaty he had concluded with the Emperor Maximilian, and the Archduke Philip, his son, because that Treaty was pernicious to the kingdom. They found that neither the Treaty nor the oath that had accompanied it could oblige the King to alienate the dominions of the Crown. From the same reason, a want of power, a treaty is absolutely null.'

"Yet these writers were speaking of treaties made by monarchs, and not by a servant of the people, like the President of the United States, whose powers are limited by a written Constitution, and where the sole body that can make law is Congress.

"Under what theory of interpretation can it be claimed that the President of the United States can make a treaty that a despot can not?

"'The powers of the President . . . can not be enlarged by analogy to the powers of an English King, because the two have their origin and mode of existence in different and opposite principles.' (10 Opin. Atty. Gen. 545)

"'But they are not prerogatives—they are legal powers vested in, and duties imposed upon, the President by the letter

of the Constitution; and they are to be exercised and judged of as other granted powers and imposed duties are.' (*Ibid.*)

"Therefore the powers exercised by the King of Great Britain or of the chief executive of any foreign nation is not authority in the United States."

§ 34. Mr. Gallatin, writing to Mr. Everett, in 1835, said:¹

"In every constitutional Government the power of raising and granting money is vested in the legislature; that of making treaties in the executive. In every such Government the question may arise whether the treaty-making power is, in every instance, paramount, and imposes on the legislature the duty of granting without examination the money necessary to pay the subsidies or indemnities promised by the treaty; or, whether the *power* of granting money, vested by the Constitution in that body, does not necessarily imply the *right* of examining and deciding each case according to its original merits.

"The present Administration of the United States is of opinion that here the Treaty-making power is paramount. It may thence have been too hastily inferred that that power was in France also acknowledged to be supreme and to pledge absolutely the legislature and the nation. There may be found in the Constitution of the United States some clauses not to be found in that of France, which sustain the construction adopted by our Executive Magistrate. But even in the United States the question has been considered as doubtful.

"Mr. Madison's resolution of the year 1796, which asserts the abstract right of the House of Representatives, was adopted by a majority of the House, and remains, unrepealed, of record on its journal. And it cannot be denied that, during the sixteen years of the administration of Presidents Jefferson and Madison, that was the avowed construction of the Constitution by the Government of the United States. It is not necessary here to inquire whether that construction is correct. I may not be an impartial judge of that question, and only mean to show that even here, it is one on which opinions have been divided."

¹ Mr. Gallatin to Mr. Everett, Jan'y. 1835, 2 Gallatin's Writings, 479 (International Law Digest, Wharton, Vol. II, p. 66).

§ 35. Patrick Henry, in the Virginia Convention, assailed the treaty-making power with great eloquence. And if he did not see the "poison under its wing," he at least pictured it as one of the beasts in the Apocalypse. He said:

"Gentlemen say that the king of Great Britain has the same right of making treaties that our President has here. . . . I will have no objection to this, if you make your President a king. . . . I say again that, if you consent to this power, you depend on the justice and equity of those in power. We may be told that we shall find ample refuge in the law of nations. When you yourselves have your necks so low that the President may dispose of your rights as he pleases, the law of nations cannot be applied to relieve you. Sure I am, if treaties are made infringing our liberties, it will be too late to say that our constitutional rights are violated. We are in contact with two powers—Great Britain and Spain. They may claim our most valuable territories, and treaties may be made to yield them. It is easy on our part to define our unalienable rights, and expressly secure them, so as to prevent future claims and disputes. Suppose you be arraigned as offenders and violators of a treaty made by this government. Will you have that fair trial which offenders are entitled to in your government? Will you plead a right to the trial by jury? You will have no right to appeal to your own Constitution. You must appeal to your Continental Constitution. A treaty may be made giving away your rights, and inflicting unusual punishments on its violators. It is contended that, if the king of Great Britain makes a treaty within the line of his prerogative, it is the law of the land. I agree that this is proper, and, if I could see the same checks in that paper which I see in the British government, I would consent to it.

7 Can the English monarch make a treaty which shall subvert the common law of England, and the constitution? Dare he make a treaty that shall violate Magna Charta, or the bill of rights? Dare he do anything derogatory to the honor, or subversive of the great privileges, of his people? No, sir. If he did, it would be nugatory, and the attempt would endanger his existence."¹

Colonel George Mason of Gunsten Hall, in the same Convention, uses this language:

¹ Elliott's Debates, Vol. III, p. 503.

"Though the king can make treaties, yet he cannot make a treaty contrary to the constitution of his country. Where did their constitution originate? It is founded on a number of maxims, which, by long time, are rendered sacred and inviolable. Where are there such maxims in the American Constitution? In that country, which we formerly called our mother country, they have had, for many centuries, certain fundamental maxims, which have secured their persons and properties, and prevented a dismemberment of their country. The common law, sir, has prevented the power of the crown from destroying the immunities of the people. We are placed in a still better condition — in a more favorable situation than perhaps any people ever were before. We have it in our power to secure our liberties and happiness on the most unshaken, firm, and permanent basis. We can establish what government we please. But by that paper we are consolidating the United States into one great government, and trusting to constructive security. You will find no such thing in the English government. The common law of England is not the common law of these States. I conceive, therefore, that there is nothing in that Constitution to hinder a dismemberment of the empire. Will any gentleman say that they may not make a Treaty, *whereby the subjects of France, England, and other powers, may buy what lands they please in this country?*¹ This would violate those principles which we have received from the mother country. The indiscriminate admission of all foreigners to the first rights of citizenship, without any permanent security for their attachment to the country, is repugnant to every principle of prudence and good policy. The President and Senate can make any treaty whatsoever. We wish not to refuse, but to guard, this power, as it is done in England. The empire there cannot be dismembered without the consent of the national Parliament. We wish an express and explicit declaration, in that paper, that the power which can make other treaties cannot, without the consent of the national Parliament — the national legislature — dismember the empire. The Senate alone ought not to have this power; much less ought a few States to have it. No treaty to dismember the empire ought to be made without the consent of three fourths of the legislature in all its branches. Nor ought such a treaty to be made but in case of the most

¹ Author's italics.

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urgent and unavoidable necessity. When such necessity exists, there is no doubt but there will be a general and uniform vote of the Continental parliament." ¹

Gov. Randolph said :

"The honorable gentleman says that, if you place treaties on the same footing here as they are in England, he will consent to the power, because the king is restrained in making treaties. Will not the President and Senate be restrained? Being creatures of that Constitution, can they destroy it? Can any particular body, instituted for a particular purpose, destroy the existence of the society for whose benefit it is created? It is said there is no limitation of treaties. I defy the wisdom of that gentleman to show how they ought to be limited. When the Constitution marks out the powers to be exercised by particular departments, I say no innovation can take place. An honorable gentleman says that this is the Great Charter of America. If so, will not the last clause of the 4th Article of the Constitution secure against dismemberment? It provides that 'nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.' And if this did not constitute security, it follows, from the nature of civil association, that no particular part shall sacrifice the whole." ²

§ 36. In replying to Patrick Henry and Colonel George Mason, Mr. George Nicholas said : ³

"The worthy Member says, that they can make a treaty relinquishing our rights and inflicting punishments; because all the treaties are declared paramount to the constitutions and laws of the States. An attentive consideration of this will show the committee that they can do no such thing. The provision of the 6th article is, that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land. They can, by this, make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers. The treaties they make must be under the authority of the United States, to be within their province. It is sufficiently secured, because it only declares

¹ Elliott's Debates, Vol. III., p. 508. ² *Ibid.*, p. 504. ³ *Ibid.*, p. 507.

that, in pursuance of the powers given, they shall be the supreme law of the land, notwithstanding anything in the constitution or laws of the particular states."

§ 37. An eminent authority on the Constitution, referring to the difficulties of enforcing treaties under the Articles of Confederation, and the limitations of that power under the Constitution, has said :

"Thus, for example, the treaty-making power was expressly vested in the United States in Congress assembled ; but when a treaty had been made, it depended entirely upon the separate pleasure of each state whether it should be executed. If the state governments did not see fit to enforce its provisions upon their own citizens, or thought proper to act against them, there was no remedy, both because the Congress could not legislate to control individuals, and because there was no department clothed with authority to compel individuals to conform their conduct to the requirements of the treaty, and to disregard the opposing will of the state.

"This defect was now to be supplied, by giving to the national authority, not only theoretically but practically, a supremacy over the authority of each state. But this was not to be done by annihilating the state governments. The government of every state was to be preserved ; and so far as its original powers were not to be transferred to the general government, its authority over its own citizens and within its own territory must, from the nature of political sovereignty, be supreme. There were, therefore, to be two supreme powers¹ in the same country, operating upon the same individuals, and both possessed of the general attributes of sovereignty.¹ In what way, and in what sense, could one of them be made paramount over the other ?

"It is manifest that there cannot be two supreme powers in the same community, if both are to operate upon the same objects. But there is nothing in the nature of political sovereignty to prevent its powers from being distributed among different agents for different purposes. This is constantly seen under the same government, when its legislative, executive, and judicial powers are exercised through different officers ; and in truth, when we come to the law-giving power alone,

¹ Author's italics.

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as soon as we separate its objects into different classes, it is obvious that there may be several enacting authorities, and yet each may be supreme over the particular subject committed to it by the fundamental arrangements of society. *Supreme laws, emanating from separate authorities, may and do act on different objects without clashing, or they may act on different parts of the same object with perfect harmony.* They are inconsistent when they are aimed at each other, or at the same indivisible object. When this takes place one or the other must yield; or, in other terms, one of them ceases to be supreme on the particular occasion. It was the purpose of the framers of the Constitution of the United States to provide a paramount rule that would determine the occasions on which the authority of a state should cease to be supreme, leaving that of the United States unobstructed. Certain conditions were made necessary to the operation of this rule. The state law must conflict with some provision of the Constitution of the United States, or with a law of the United States enacted in pursuance of the constitutional authority of Congress, or with a treaty duly made by the authority of the Union. The operation of this rule constitutes the supremacy of the national government. It was supposed that, by a careful enumeration of the objects to which the national authority was to extend, there would be no uncertainty as to the occasions on which the rule was to apply; and as all other objects were to remain exclusively subject to the authority of the states within their respective territorial limits, the operation of the rule was carefully limited to those occasions."¹

§ 38. Mr. Madison's views were elaborately expressed in the Virginia Convention of 1788, called to ratify the Constitution. He was a strong advocate of the adoption of the Constitution. The history of this Convention, by Hugh Blair Grigsby, edited by R. A. Brock and published by the Virginia Historical Society, is worthy of perusal by the student of the history of those times. The pictures of the great characters of the Convention are drawn by a master hand. Patrick Henry, Washington, Jefferson, Randolph, Madison, Pendleton, and others are pictured in living light. Called upon to reply to Patrick Henry, George

¹ Curtis' "Constitutional History of the United States," Vol. I, 550, 557, Harper & Brothers.

Mason, and others, who were claiming the treaty-making power as unlimited, Madison said :

"I am persuaded that, when this power comes to be thoroughly and candidly viewed, it will be found right and proper. As to its extent, perhaps it will be satisfactory to the committee that the power is, precisely, in the new Constitution as it is in the Confederation. In the existing confederacy, Congress are authorized indefinitely to make treaties. Many of the states have recognized the treaties of Congress to be the supreme law of the land. Acts have passed, within a year, declaring this to be the case. I have seen many of them. Does it follow, because the power is given to Congress, that it is absolute and unlimited? I do not conceive that power is given to the President and Senate to dismember the empire, or to alienate any great, essential right. I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation. One objection against the amendment proposed is this, that, by implication, it would give power to the legislative authority to dismember the empire—a power that ought not to be given, but by the necessity that would force assent from every man. I think it rests on the safest foundations as it is. The object of treaties is the regulation of intercourse with foreign nations and is external. I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might, and probably would, be defective. They might be restrained, by such a definition, from exercising the authority where it could be essential to the interest and safety of the community. It is most safe, therefore, to leave it to be exercised as contingencies may arise."¹

§ 39. At another time during this Convention, he uses this language :

"The Confederation is so notoriously feeble, that foreign nations are unwilling to form any treaties with us; they are apprized that our general government cannot perform any of its engagements, but that they may be violated at pleasure by any of the states. Our violation of treaties already entered

¹ Elliott's Debates, Vol. III, p. 514.

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into proves this truth unequivocally. No nation will, therefore, make any stipulations with Congress, conceding any advantages of importance to us; they will be the more averse to entering into engagements with us, as the imbecility of our government enables them to derive many advantages from our trade, without granting us any return. But were this country united by proper bands, in addition to other great advantages, we could form very beneficial treaties with foreign states. But this can never happen without a change in our system. Were we not laughed at by that minister of that nation, from which we may be able yet to extort some of the most salutary measures for this country? Were we not told that it was necessary to temporize till our government acquired consistency? Will any nation relinquish national advantages to us? You will be greatly disappointed, if you expect any such good effects from this contemptible system."¹

Subsequently, after the organization of the government, when Mr. Madison was a member of the House of Representatives and known as the "Father of the Constitution," and possessing the highest right of any man of his day to speak on this subject, he was drawn into the debate on the ratification of the Jay Treaty, which provided for an appropriation of money. Since Congress alone under the Constitution can appropriate money, the right of the House as one branch of Congress to consider the treaty was claimed. President Washington, in a paper of great power and dignity, refused to submit the treaty to the House, and the question before the House was whether they had a right to inspect the treaty whose validity depended upon their action; on this question the House asserted its prerogative by a vote of 63 to 36. Mr. Madison said he

"Would appeal to the Committee to decide, whether it did not appear, from a candid and collective view of the debates in those conventions, and particularly in that of Virginia, that the treaty-making power was a limited power; and that the powers in our Constitution, on this subject, bore an analogy to the powers on the same subject in the government of Great Britain. . . . On a review of these proceedings, may not the question be fairly asked, whether it ought to be supposed

¹ Elliott's Debates, Vol. III, pp. 135, 136.

that the several conventions — who showed so much jealousy with regard to the powers of commerce, of the purse, and of the sword, as to require for the exercise of them in some cases two-thirds, in others three-fourths, of both branches of the legislature — could have understood that, by the treaty clauses in the Constitution, they had given to the President and Senate, without any control whatever from the House of Representatives, an absolute and unlimited power on all these great objects."¹

William Loughbridge, a celebrated lawyer of Iowa, on June 30, 1868, on the floor of the House, said:

"An attempt is made, through the means of the treaty-making power, to concentrate almost all of the power of this Government in the hands of the President, subject only to the advice and consent of the Senate. And this proposition is, if adopted, a long step in that direction. I hesitate not to say, sir, that if, without any explanation, disaffirmance, or protest, we make this appropriation, we shall, so far as this House can do it, have surrendered practically all the power of the Government into the hands of the treaty-making department and reduced this House to the position of an involuntary agent of that power, with no discretion but to carry out its expressed will. That we are rapidly drifting in that direction, it seems to me, must be apparent to the most casual observer.

"By substituting a foreign Government or an Indian tribe in place of this House, on the principle claimed by the Executive, there is nothing within the whole scope of the legislative powers of the Government that can not be done without the consent or intervention of this House. I defy any gentleman to point out a single act of legislation that can not be done through and by the treaty-making power, if we admit that power to the extent claimed by the Executive."²

Among the recent contributions to this subject, distinguished alike for legal acumen, thorough investigation, and scholarly presentation, none is more worthy of perusal than "Limitations on the Treaty-making Power," etc., by Prof. William E. Mikell, of the University of Pennsylvania.³

¹ "The Life and Times of James Madison," Rives, Vol. III, pp. 558, 559. Also found in *Annals of Congress*, Vol. V, p. 502.

² *Congressional Globe*, 40th Congress, 3621.

³ *University of Pennsylvania Law Review & American Law Register*, for April and May, 1909, Vol. LVII, Nos. 7 and 8.

CHAPTER II

OPINIONS OF JUDGES, FEDERAL AND STATE, ON THE TREATY-
MAKING POWER, FROM DECIDED CASES

§ 40. In the last chapter we gave the views of many public men and statesmen from the early history of the country down to the present day on the treaty-power under the Constitution of the United States, and in this chapter the opinions of many of the judges of the country, both Federal and State, are sought to be collected.

Professor Willoughby, in his work on the Constitution, says: ¹

"JUDICIAL DICTA THAT RESERVED RIGHTS OF THE STATES
MAY NOT BE INFRINGED.

"Upon this point the declarations of the Supreme Court are not completely satisfactory. In various of its opinions this tribunal has explicitly asserted that the rights reserved by the Constitution from the control of the other departments of the Federal Government may not be infringed by its treaty-making power."

§ 41. Mr. Justice Daniel, in the License Cases, speaking of Article VI of the Constitution where treaties are declared to be the supreme law of the land, says:

"This provision of the constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government, must be expounded in coincidence with a perfect right in the

¹ Vol. I, Section 213.

States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State. In cases of alleged conflict between a law of the United States and the constitution, or between the law of a State and the constitution or a statute of the United States, this court must pronounce upon the validity of either law with reference to the constitution; but, whether the decision of the court in such cases be itself binding, or otherwise, must depend upon its conformity with, or its warrant from, the constitution. It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the constitution and the laws both of the States and of the United States."¹

§ 42. Chief Justice Taney, in the Passenger Cases,² uses the following language:

"The first inquiry is, whether, under the Constitution of the United States, the federal government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment, this question lies at the foundation of the controversy in this case. I do not mean to say that the general government have, by treaty or act of Congress, required the State of Massachusetts to permit the aliens in question to land. I think there is no treaty or act of Congress which can justly be so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the States are bound to submit to it. For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons,

¹ 5 How. 613, 12 L. ed. 256.

² 7 How. 465, 12 L. ed. 702.

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whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize or enforce. I had supposed this question not now open to dispute."

§ 43. Justice Swayne, in *United States v. Rhodes*,¹ uses this language:

"A treaty is declared by the Constitution to be the 'law of the land,'" but adds, "What is unwarranted or forbidden by the Constitution can no more be done in one way than in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the State governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The States possess all which they have not surrendered; the government of the Union only such as the Constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void."

Justice Swayne also in the *Cherokee Tobacco* case² uses this language:

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government."

§ 44. Mr. Justice Clifford uses this language in *Holden v. Joy*, in speaking of the treaty-power:³

"That the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States."

¹ U. S. Cir. Ct. 1866, 1 Abb. U. S. Rep. 43, 44. Fed. Cases 16151.

² 11 Wallace 616, 20 L. ed. 227.

³ 17 Wallace 243, 21 L. ed. 523.

§ 45. Justice White, in *Downes v. Bidwell*, says:¹

"The theory as to the treaty-making power upon which the argument which has just been commented upon rests, it is now proposed to be shown, is refuted by the history of the government from the beginning. There has not been a single cession made from the time of the Confederation up to the present day, excluding the recent treaty with Spain, which has not contained stipulations to the effect that the United States through Congress would either not disincorporate or would incorporate the ceded territory into the United States. There were such conditions in the deed of cession by Virginia when it conveyed the Northwest Territory to the United States. Like conditions were attached by North Carolina to the cession whereby the territory south of the Ohio, now Tennessee, was transferred. Similar provisions were contained in the cession by Georgia of the Mississippi territory, now the States of Alabama and Mississippi. Such agreements were also expressed in the treaty of 1803, ceding Louisiana; that of 1819, ceding the Floridas, and in the treaties of 1848 and 1853, by which a large extent of territory was ceded to this country, as also in the Alaska treaty of 1867. To adopt the limitations on the treaty-making power now insisted upon would presuppose that every one of these conditions thus sedulously provided for was superfluous, since the guaranties which they afforded would have obtained, although they were not expressly provided for.

"When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been even mooted."

Justice White, in *Downes v. Bidwell*,² further says:

"And, looked at from another point of view, the effect of the principle asserted is equally antagonistic, not only to the express provisions but to the spirit of the Constitution in other respects. Thus, if it be true that the treaty-making power has the authority which is asserted, what becomes of that

¹ 182 U. S. 318, 45 L. ed. 1088, 21 S. C. 770.

² *Id.*, p. 313.

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branch of Congress which is peculiarly the representative of the people of the United States, and what is left of the functions of that body under the Constitution? For, although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue — bills for which, by the Constitution, must originate in the House of Representatives — and the authority to prescribe uniform naturalization laws would be in effect set at naught by the treaty-making power. And the consequent result — incorporation — would be beyond all future control of or remedy by the American people, since, at once and without hope of redress or power of change, incorporation by the treaty would have been brought about. The inconsistency of the position is at once manifest."

And again he says:¹

"If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the Government be overthrown. While thus aggrandizing the treaty-making power on the one hand, the construction at the same time minimizes it on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treaty-making power then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted — vested with the right to destroy upon the one hand and deprived of all power to protect the government on the other."

§ 46. Chief Justice Fuller, in *Downes v. Bidwell*,² *supra*, says:

¹ 182 U. S. 312, 45 L. ed. 1088, 21 S. C. 770.

² Page 370.

"Indeed a treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would be simply void. . . . And it certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a foreign nation by the President and two thirds of a quorum of the Senate. See 2 Tucker on the Constitution, §§ 354-356."

§ 47. In *Turner v. The American Baptist Missionary Union*,¹ Justice McLean, in delivering the opinion of the Court, says :

"A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government, can be regarded as a law, until it shall have all the sanctions required by the constitution to make it such. As well might it be contended, that an ordinary act of Congress, without the signature of the President, was a law, as that a treaty which engages to pay a sum of money, is in itself a law.

"And in such a case, the representatives of the people and the States, exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required."

§ 48. Mr. Chief Justice Murray, in *Siemssen v. Bofer*,² delivered the following strong opinion :

"In my opinion, the treaty-making power can only be coeval with the express grant of power to the Federal Government, and can never be extended, by implication, to the reserved

¹ 5 McLean 347. Fed. Cases 14251.

² 6 California Reports, pp. 250-252.

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powers of the State, or matters which belong to State Sovereignty, or the right which appertains to each State to govern her own domestic concerns, and establish her own police regulations; neither can the exercise of this power, on the part of the President and Senate, be extended to matters which are the proper subject of congressional legislation; 'for it would,' as Mr. Jefferson truly remarks, in his letter to Mr. Monroe, in 1796, upon the subject of the British treaty, 'be virtually transferring the powers of legislation from the President, Senate and House of Representatives, to the President, Senate and Piamingo, and any other Indian, Algerine or other chief.'

"The true rule of interpretation, in my opinion, is, that whenever the treaty embraces matters which are the subject of legislation by Congress, it will require an act of legislation to carry the treaty into effect; otherwise the House of Representatives is a useless appendage to the political machinery of our government, and powers which are expressly prohibited to Congress, or reserved to the States, may be exercised through the instrumentality or omnipotence of the treaty-making power.

"To assert the proposition that the President and Senate are above the Constitution in this particular, and that they may do in this behalf, what the President, and both Houses of Congress cannot do, would be destructive of the government; for, under the cover of a resort to the treaty-making power, every outrage and injustice which illiberality can conceive, or fanaticism execute, may be perpetrated. By a treaty with England, her free black citizens may be introduced into South Carolina and other slave States of the Union, contrary to the police regulations of those States. The Asiatics, and the convicts of the penal colonies of the South Pacific, may be introduced into California on the same footing as the intelligent and virtuous population of the more favored portions of Europe, and every branch of trade, agriculture, commerce and manufactures, may be prostrated at the feet of this unconstitutional mastodon. Nay, more; by a treaty of amity and friendship with the Emperor Soulouque of Hayti, every slave in the Southern States may be emancipated, and turned loose upon their present masters.

* * * * *

"It cannot be contended, with any show of reason, that the Federal Government took this grant of power in the enlarged

sense in which it is exercised by England, and the nations on the continent of Europe; or that she is vested with the same plenary powers that the individual States were before the adoption of the Constitution. . .

"The political structure of our government forbids such an idea. The power must be construed in reference to the powers delegated to the United States, and those reserved to the States, and must be further limited to objects which are the peculiar and proper subject matter of treaty stipulation.

"The exercise of this power under the Constitution, can scarcely extend beyond that of declaring war, making peace, regulating commerce, and adjusting national misunderstandings or differences; and for the execution of such purposes, the power to alter the rules of descent, to change the domestic policy of a State, and to alter the laws of evidence are not incidents, any more than the right to abolish slavery, or any of the other acts we have enumerated."

§ 48 a. In *The People v. Naglee*,¹ a case involving the constitutionality of a law of California requiring a license fee of all foreigners for the privilege of working the gold mines in said State, one of the questions being whether said law contravened a treaty between the United States and China, Judge Bennett, delivering the unanimous opinion of the Court, said:

"But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the state law give away. The question in such case would not be solely what is provided for by the treaty, but whether the state retained the power to enact the contested law, or had given up that power to the general government. If the state retains the power, then the president and senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that

¹ 1 Cal. 246, pp. 246, 247. See dissenting opinion of Judge Field in *Lin Sing v. Washburn*, 20 Cal. 584, sustaining the judgment in this case.

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body, it cannot supersede a state law which enforces or exercises any power of the state not granted away by the constitution. To hold any other doctrine than this, would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation. . . .

"It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation. . . ."

In 1878 the legislature of California passed an act entitled "An Act to protect public health from infection," etc., and which prescribed certain conditions for exhuming the dead, and certain fees to be paid, and so on, the Act being general in its character and applicable to all persons. It was objected to the Act that it was in conflict with the Burlingame Treaty between the United States and China. Sawyer, C. J., in delivering the opinion of the Court in a noted case held that the Act did not conflict with said treaty, and adds: ¹

"Besides, it may well be questioned whether the treaty-making power would extend to the protection of practices, under the guise of religious sentiment, deleterious to the public health or morals, or to a subject-matter within the acknowledged police power of the state. . . ."

§ 49. In the case of *Compagnie Française de Navigation v. State Board of Health*,² involving a conflict between an Act of Louisiana, giving powers to the State Board of Health to prohibit the introduction of infected persons, etc., and a Treaty between the United States and Italy, Chief Justice Nicholls, speaking for the court, said (pp. 660 and 662):

¹ *In re Wong Yung Quy*, Fed. Rep. Vol. 2, p. 632.

² 51 La. Ann. 645.

"Appellants maintain that the act of the General Assembly is violative of the constitution of the United States, and in contravention of its treaties with France and Italy, and its immigration laws. We are not of that opinion. It is the right and duty of the different States to protect and preserve the public health. This right is not held by the States by permission of the Federal government nor is its legitimate and proper exercise controlled by that government simply by reason of the existence of a power in the latter 'to regulate commerce.' As a matter of course, State legislation which would cross the boundary line which separates the State's police power of protecting the public health, to really interfere with and invade the right and power of the general government to regulate commerce, would be set aside, but it is not every restriction upon commercial operations, remotely and incidentally brought about by the passage of State health laws, which can properly be designated as such interference or invasion. *In re Rahrer*, 140 U. S. 554, the Supreme Court of the United States, speaking through Chief Justice Fuller, made use of the following language: 'The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized State legislation, legitimately for police purposes, as not, in the sense of the Constitution, infringing upon any right which has been confided, expressly or by implication, to the general government. . . .'

"The treaties and laws of the United States must be held to have been passed with reference to and subsidiary to the rightful exercise of the police power by the different States in aid of the protection and preservation of the public health within their respective borders. We scarcely think it could be pretended that an act of the General Assembly of Louisiana, under the provisions of which a shipload of citizens of the State of New York could be legally prevented from being landed in the city of New Orleans during an epidemic, could, by reason of a treaty, be held as against foreigners coming to our shores, to be inoperative, null and void. They could have no broader rights than our own citizens, in this matter, and should be

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subjected to the same restrictions and inconveniences which they are, when these are demanded at their hands for the preservation and protection of the public health. . . ."

This case was appealed to the Supreme Court of the United States and affirmed in an opinion by Justice White.¹

§ 50. In the case of *Jones v. Walker*,² Chief Justice Jay in his opinion discusses the validity of treaties in an interesting way as follows:

"Perhaps it may tend to elucidate the subject if we were to consider *validity* applied to treaties, as admitting of two descriptions, viz., *necessary* and *voluntary*.

"By *necessary* validity, I mean that which results from the treaty's having been made by persons authorized by, and for purposes consistent with the constitution. To this kind of validity all such questions as these relate, viz.: Has the treaty been made and ratified by the President, by the advice and consent of three-fourths of the senators present? Is it temporary, and has it expired? Is it perpetual? Has it been dissolved with mutual agreement? Has it been annulled and declared to be void by the nation, or by those to whom the nation has committed that power? Does it contain articles repugnant to the constitution? Are those articles void? Do they vitiate the whole treaty? etc., etc.

"By *voluntary* validity, I mean that validity which a treaty, become voidable by reason of violations, afterwards continues to retain by the silent volition and acquiescence of the nation. I call it *voluntary*, because it entirely depends on the will of the nation, either to let it continue to operate, or to annul and extinguish it.

"To this head such questions as these relate, viz.: Has the treaty been so violated as justly to become voidable by the injured nation? Is it advisable immediately to declare it void? Would such a measure probably produce a war? Would it be more prudent first to remonstrate and demand reparation, or to direct reprisals? Are we in condition for war? Ought we at this juncture to risk it, or shall we postpone that risk until we can be better prepared for it? Shall we at this moment

¹ *Compagnie Française v. Board of Health*, 186 U. S. 380, 46 L. ed. 1225, 22 S. C. 895.

² 2 Paine C. C. 695. Fed. Cases 7507.

take *any* measures, or would it be more prudent to remain silent for the present, and let the treaty go on and continue to operate as if nothing had happened? etc., etc.

"On comparing the principles which govern and decide the *necessary* validity of a treaty, with those on which its *voluntary* validity depends, we cannot but perceive that the former are of a *judicial*, and that the latter are of a *political* nature. That diversity naturally leads to an opinion that the former are referable to the judiciary, and the latter to those departments who are charged with the political interests of the States."

§ 51. In *Doe v. Braden*,¹ Chief Justice Taney says:

"The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of the provisions, *unless they violate the Constitution of the United States.*"²

¹ 16 How. 635, 14 L. ed. 1090.

² Author's italics.

CHAPTER III

THE TREATY POWER UNDER THE ARTICLES OF CONFEDERATION AS STRONG AS UNDER THE CONSTITUTION. THE CHIEF DIFFERENCE BEING THAT UNDER THE FORMER THERE WAS NO JUDICIAL TRIBUNAL TO ENFORCE TREATIES

§ 52. Since the Constitution of the United States was developed from the Articles of Confederation, it will be necessary to examine the following Articles in that instrument bearing upon the treaty power :

ARTICLE II. "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled."

ARTICLE V. . . . "Each state shall have one vote."

ARTICLE VI. "No state without the consent of the United States in Congress assembled, shall enter into any conference, agreement, alliance, or treaty, &c."

ARTICLE IX. "The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war; . . . Entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever." . . .

"The United States, in Congress assembled, shall never engage in a war, . . . nor enter into any treaties or alliances; . . . unless nine states assent to the same."

ARTICLE XIII. "Every state shall abide by the determination of the United States in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every state; and the Union shall be perpetual."

§ 53. In the consideration of the treaty-making power under the Articles of Confederation, we will consider first the Articles themselves, quoted *supra*, as to their scope and meaning; and second, we will consider historically their adoption, by whom adopted, and their binding effect upon the parties to them.

First: In the Declaration of Independence each of the original thirteen States had declared "That these united colonies are, and of right ought to be free and independent States . . . and that as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do." That Declaration proclaimed the fact that each one of the States was clothed with all of the powers incident to free and independent States. How long they retained all of these original powers before yielding some of them to the Continental Congress it is needless to inquire. The statement in the Declaration of Independence did not clothe them with these powers, it was merely the declaration of what already existed; and when the representatives of each State in the Continental Congress undertook to frame the Articles of Confederation, each State possessed and retained all of the rights of sovereign States, except such as had been accorded the Congress in their voluntary union for their mutual defense and welfare against a common enemy.

The Continental Congress was plainly inadequate to the needs of the hour. A common cause, a common patriotism, and their threatened subjugation by the Mother Country, united in demanding a closer union and greater powers in the Congress for the establishment of the freedom of the American people. And so it came to pass, in order to effect this closer union, while each State was to retain those powers which were

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necessary for its domestic development, that the powers which each possessed affecting their relations with foreign countries, or their common interests at home, such as the power to carry on war, to conclude peace, to make treaties, etc., were to be surrendered by each to a central hand to be administered for the benefit of all; and hence we find this idea expressed in Article II, "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this Confederation *expressly* delegated to the United States in Congress assembled." This Declaration was clear, simple, and complete.

If a question during this period arose, as to whether Congress possessed a certain power, it was only necessary to refer to the Articles to see if such power was *expressly* granted to Congress therein. There was no room here for the doctrine of implied powers. This was impossible. Nor was there any place here for the doctrine of inherent powers, for the Congress under this Article possessed only those which were *expressly* granted. No State could declare war, make a treaty, or regulate the alloy and value of coin, or fix the standard of weights, or establish post-offices, or commission officers in the service of the United States, because these were all expressly given to Congress. But every power, jurisdiction, and right pertaining to the State in its sovereign capacity, remained with each, except such as had been expressly delegated to Congress.

§ 54. Having adopted Article II, defining the powers of Congress, and the States under the Articles, in order to leave no doubt in the minds of any one as to its scope and meaning, Article XIII followed. "Every State shall abide by the determination of the United States in Congress assembled, *on all questions which by this Confederation shall be submitted to them.*¹ And the Articles of Confederation shall be *inviolably observed by every State;*¹ and the Union shall be perpetual."

¶ The binding effect of Article II on each and every State is here made clear and unequivocal. The effect of any power

¹ Author's italics.

herein granted to the Congress, on the domestic policy of any State, need not be considered. They had solemnly considered what questions should be considered by the Congress in the enumeration of those powers which had been granted to the Congress in Article IX. They had the right to withhold, or to give power; they had the right to limit such powers, as they had done in Article IX, as to treaties of commerce; and in the same Article where the assent of nine States was necessary to enact a binding treaty. So that when in Article IX, the United States in Congress assembled were given "the sole and exclusive right and power of . . . entering into treaties and alliances," there could be no ground for questioning its power and extent. The power of the Congress to make such treaties is sanctioned in Article II, wherein it is declared that the Congress in order to possess a power, must find it *expressly* delegated to them. The extent of the power is shown in Article XIII, where every State is required to abide by "all questions which by this Confederation shall be submitted to them; and the Articles of this Confederation shall be inviolably observed by every State." When once the power is found, as in this case, *expressly* delegated to Congress, the States are bound by it. It would be difficult to find a stronger presentation of the supremacy of any power than is shown in the Articles of Confederation, for the treaty-making power. There was no divided supremacy, as found in Article VI of the Constitution.

In Article VI, the State is prohibited from entering into any treaty. This sovereign power, which each possessed before the adoption of these Articles, each surrendered. Added to this, is Article XI, "The United States, in Congress assembled, shall have the *sole* and *exclusive* right and power of entering into treaties," etc. The State is denied the right to make a treaty. The United States, in Congress assembled, are given the sole and exclusive right to make them. Human language could not be stronger or clearer. The use of the words, *sole* and *exclusive* in the power to make treaties, excludes any possible interference that might be offered by any State, and with the binding effect

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of Article XIII on the States, no loophole for escape against these provisions in favor of the *sole* and *exclusive* power of Congress to make treaties is left the State.

§ 55. *Second.* Having considered the several Articles bearing upon the treaty-making power in the Articles of Confederation — in their full scope and meaning — it becomes necessary now to consider the origin of the Articles; and whether their adoption was by a body competent and authorized to make them effective and conclusive upon the newly liberated States.

The scope and meaning of these Articles may be broad and clear, and yet, if they were without authority or binding force when adopted, and never ratified afterwards by a competent authority they were powerless for good. On the other hand, if they were the product of a body empowered to act for the people of the several States in the premises; or, if without authority originally to bind the several States, these unauthorized provisions were accepted and adopted by the States in binding form, they are effective and conclusive.

The Articles of Confederation were passed November 15, 1777, by the Continental Congress. Whom did this Congress represent? And what powers did it possess to make the Articles of Confederation binding upon the States? If we regard the Continental Congress as a mere committee of safety whose delegates were appointed by the several States to "confer and resolve," with no power to act; as a Parliament with all the exterior badges of authority, but in reality, lacking every element of initiative and action, it is at least historically true, that by recorded vote of its members on the 15th of November, 1777, they adopted these Articles, not as final nor as binding on the States, but with this provision attached to them: "These Articles shall be proposed to the Legislatures of all the United States, and if approved by them, they are advised to authorize their delegates to ratify the same in the Congress of the United States, which being done, the same shall become conclusive." This provision required the ratification by all of the States

before the Articles could become binding on any one of them. A copy of the Articles was sent to each State, who gave them their legal sanction by their separate and independent ratification; and if originally proposed by the Continental Congress without authority, their ratification by the several States made them as conclusive upon the States as if proposed by a competent authority. *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*

§ 56. But the Continental Congress was not, as supposed above, a body unauthorized to formulate the Articles of Confederation; and in so doing, the delegates were representing their several States under their credentials which authorized such action. An appeal to their credentials will settle this question completely. Judge Story says, speaking of the first Continental Congress which met on the 5th of September, 1774: "The Convention, thus assembled, exercised *de facto* and *de jure* a sovereign authority; not as the delegated agents of the governments *de facto* of the colonies, but in virtue of original powers derived from the people." The learned author was hardly warranted in attributing such power to this Convention, for many of the delegates, notably, those from Massachusetts, Rhode Island, Connecticut, Pennsylvania, and South Carolina were appointed either by the popular branch of the General Assembly of their State, or by both branches, the Senate and the House; and therefore, such delegates could only exercise a delegated authority, since sovereign authority can only emanate from the people. In the other States, where the Assemblies had been dissolved by the King, the selections were made by the people in convention. The Congress itself recognized its own limitations, for it did not claim, in adopting the Articles of Confederation, that such act was binding on the States; for they referred them back to the States for their ratification; and without the ratification by all, it was binding on none. If the Congress, as Judge Story claims, was exercising original sovereign powers, referring the Articles back to the States for ratification was an unnecessary step.

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§ 57. The credentials of the delegates to the first Congress will be found in the First Journal of Congress, page 69. A marked similarity is shown in all of these.

In New Hampshire, it was declared that "They (the delegates) and each of them, in the absence of the other, have full and ample power in behalf of this province to consent and agree to all measures which said Convention shall deem necessary," etc.

In North Carolina, the credentials contained this provision, "And they are hereby invested with such powers as may make any acts done by them, or any of them, or consent given in behalf of this province, obligatory in honor upon every inhabitant thereof."

In Maryland, they were appointed with "full and ample power to consent and agree to all measures that such Convention shall deem necessary."

New Jersey and Delaware required their delegates to report their proceedings "to the next session of the General Assembly." In New York the delegates were commissioned "to consent and determine upon such measures as shall be adjudged most effectual." These credentials gave ample latitude to the Congress to consider and propose the Articles of Confederation to the States, but it is clear that without the ratification of them by the several States, the action of the Congress would have been futile. The credentials of the delegates to the Congress, which passed the Articles of Confederation, are in many respects similar to those just quoted, given to the members of the First Continental Congress. The States which commissioned delegates to the Congress which enacted the Articles of Confederation by their General Assemblies, were Connecticut,¹ Massachusetts,² North Carolina,³ Maryland,⁴ Pennsylvania,⁵ and Virginia.⁶

New Hampshire selected its delegates by its House of Representatives,⁷ New York elected its delegates through a Con-

¹ Journals of Congress, III, p. 5.

² *Id.*, p. 7.

³ *Id.*, p. 37.

⁴ *Id.*, p. 53.

⁵ *Id.*, p. 54.

⁶ *Id.*, p. 261.

⁷ *Id.*, pp. 32 and 134.

vention of the Representatives of the State of New York.¹ Rhode Island and Providence Plantations elected its delegates by the people.²

§ 58. It is manifest from the mode of these appointments that the delegates were not clothed with sovereign power; but were merely the delegated agents of their respective States. Only two of the States, New York and Rhode Island, elected by the people, or by a Convention of the people, the only source of sovereign power, and hence the Congress, after adopting the Articles of Confederation, referred them back to the States for their ratification.

The form of some of these credentials are interesting: In Connecticut, after giving full authority to their delegates, "To consult, advise and resolve upon measures necessary to be taken and pursued for the defense, security and preservation of the rights and liberties to the United States," etc., they were required to send to the General Assembly of the State, such of their "proceedings and resolves," etc.

Massachusetts empowered her delegates to "Concert, direct, and order such further measures . . . for prosecuting the present war, concluding peace, *contracting alliances*,"³ and so on.

North Carolina invested her delegates with such powers "As may make any act done by them, or any of them, or consent given in the said Convention, in behalf of this State, obligatory upon every inhabitant thereof."

Maryland authorized her delegates to "Execute every measure which they . . . together with a majority of the Continental Congress, shall judge necessary for the defense, security and interest or welfare of this State in particular, and of America in general."

It is clear from the above recital, that the delegates to the Continental Congress, from its beginning in 1774 to its close in 1788, represented the several States from which they came; and each delegate was responsible to his own State, under his credentials, for his action. The separate credential of each

¹ Journals of Congress, III, p. 160. ² *Id.*, p. 171. ³ Author's italics.

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gave them power to consult, advise, and resolve upon measures which were necessary and expedient for the security of all the States. The separate States, through their General Assemblies, or Conventions of the people, commissioned them, and with their commissions, they took their credentials, giving them the authority above stated, which was similar in its nature to the charter granted to a corporation by the State. We conclude, therefore, that the Continental Congress represented the several States, and each commissioned its own delegates. And though the number of delegates from each State was not the same, yet, in the Congress each State had but one vote, and the vote was by States, and not by numbers. Having the power, as shown by their credentials, to consult, advise, and propose what might be best for all in the defense of common rights and of common liberties, this body had the unquestioned right to adopt the Articles of Confederation, and propose them to the States for their ratification; but had no power to bind the States, since, under their credentials, they were only authorized to consult, propose, advise and so on. But when they were proposed by the Congress, then referred back to the States for their approval and ratification, and approved by each of the States, they became binding upon all.

§ 59. We have thus sought to give the full scope and meaning of the provisions of the Articles of the Confederation relating to the treaty-making power, wherein the Congress is given the sole and exclusive power of making treaties and to show their binding effect after being ratified by the Congress; but undoubtedly there was a division of sentiment among individuals and States as to how far the treaty-making power was vested in the Congress to the exclusion of the rights of the States. But few treaties were made by the Congress during that period; but by some of those, some of the States refused to be bound.

During the Revolutionary War in some States laws were passed to confiscate British debts; and there can be no doubt that the feeling throughout America — held by a considerable number of people, was against the payment of debts to their

enemies, who, by a destructive war lasting seven years, had drained the resources of the country practically to the verge of bankruptcy. And the argument was strongly used, that if British subjects, by waging an unjust war, had reduced the capacity of Americans to pay their debts, the latter should be released from their obligations. The payment of debts, recognized as one of the highest duties of good citizenship, though rarely accompanied by ecstasy, even when paid to a friend, is robbed even of that solace when compelled by an enemy, who has taken away from his debtor the means of payment. While this view is sound from neither a personal nor a national point of view, it is one which inevitably arises after a war between two countries. It was therefore not surprising that the Revolutionary period, as well as the post-Revolutionary period produced such sentiment; and America being largely the debtor nation at the close of the Revolution, it was not the least surprising that when the definitive Treaty of Peace came to be made that Great Britain should have exhibited the greatest interest in securing the rights of creditors. It is a part of the history of the times that on the part of Great Britain it was regarded as one of the most important features of the proposed treaty, while the better thought of America, rising above the passions engendered by the long and bloody war, recognized this as a legitimate subject for settlement when peace was declared. The Congress had no doubt of its power to make a treaty which would be binding on the States, as may be seen from a letter of theirs, a part of which I quote:¹

"The Secretary for foreign affairs, (John Jay) having in pursuance of an order of Congress, reported the draft of a letter to the states to accompany the resolutions, passed the 21st day of March, 1787, the same was taken into consideration and unanimously agreed to as follows;

"Sir;

"Our secretary for foreign affairs has transmitted to you copies of a letter to him, from our minister at the court of Lon-

¹ Journals of Congress, Vol. XII, p. 45.

don, of the 4th day of March, 1786, and of the papers mentioned to have been enclosed with it.

"We have deliberately and dispassionately examined and considered the several facts and matters urged by Britain, as infractions of the treaty of peace of the part of America, and we regret that in some of the states too little attention appears to have been paid to the public faith pledged by that treaty.

"Not only the obvious dictates of religion, morality and national honor, but also the first principles of good policy, demand a candid and punctual compliance with engagements constitutionally and fairly made.

"Our national constitution having committed to us the management of the national concerns with foreign states and powers, it is our duty to take care that all the rights which they ought to enjoy within our jurisdiction by the laws of nations and the faith of treaties, remain inviolate. And it is also our duty to provide that the essential interests and peace of the whole confederacy be not impaired or endangered by deviations from the line of public faith, into which any of its members may from whatever cause be unadvisedly drawn.

"Let it be remembered that the Thirteen Independent Sovereign States have, by express delegation of power, formed and vested in us a general though limited sovereignty, for the general and national purpose specified in the confederation. In this sovereignty they cannot severally participate (except by their delegates) nor with it have concurrent jurisdiction; for the ninth article of the confederation most expressly conveys to us the sole and *exclusive* right and power of determining on *war* and *peace*, and of entering into *treaties* and alliances, &c.

"When therefore a treaty is constitutionally made, ratified and published by us, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention of state legislatures. Treaties derive their obligation from being compacts between the sovereign of this and the sovereign of another nation; whereas laws or statutes derive their force from being the acts of a legislature competent to the passing of them. Hence it is clear that treaties must be implicitly received and observed by every member of the nation; for as state legislatures are not competent to the making of such compacts or treaties, so neither are they competent in that capacity, authoritatively to decide on, or ascertain

the construction and sense of them. When doubts arise respecting the construction of state laws, it is not unusual nor improper for the state legislatures, by explanatory or declaratory acts, to remove those doubts: but the case between laws and compacts or treaties is in this widely different; for when doubts arise respecting the sense and meaning of a treaty, they are so far from being cognizable by a state legislature, that the United States in Congress assembled have no authority to settle and determine them; for as the legislature only, which constitutionally passes a law, has power to revise and amend it, so the sovereigns only, who are parties to the treaty, have power by mutual consent and posterior articles, to correct or explain it. . . . Thus much we think it useful to observe, in order to explain the principles on which we have unanimously come to the following resolution, viz.:

"*Resolved*, That the legislatures of the several states cannot of right pass any act or acts for interpreting, explaining, or construing a national treaty, or any part or clause of it; nor for restraining, limiting, or in any manner impeding, retarding or counteracting the operation and execution of the same; for that on being constitutionally made, ratified and published, they become in virtue of the confederation, part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory on them."

§ 60. Again: John Jay, subsequently the first Chief Justice of the United States Supreme Court, was Secretary of Foreign Affairs under the Congress of the Confederation. Under the direction of Congress he was requested to report to them his views of their powers to make binding treaties without objection by the States. This Report is found in Vol. IV of the Secret Journals of Congress, page 185. I quote from page 203:

"On considering the before recited papers, these important questions present themselves:

"1. Whether any individual state has a right, by acts of their own internal legislature, to explain and decide the sense and meaning in which any particular article of a national treaty shall be received and understood within the limits of that state?

"2. Whether any and which of the acts enumerated in the

list of grievances do violate the treaty of peace between the United States and Great Britain?

"3. In case they or any of them should be found to violate it, what measure should be adopted in relation to Great Britain? And

"4. What measures should be adopted in relation to the state or states which passed the exceptionable acts?

"Of these in their order; and

"1. Of the right of an individual state to enact in what sense a national treaty shall be understood within its particular limits.

"Your secretary considers the thirteen independent sovereign states as having, by express delegation of power, formed and vested in Congress a perfect though limited sovereignty for the general and national purposes specified in the confederation. In this sovereignty they cannot severally participate (except by their delegates) or have concurrent jurisdiction; for the ninth article of the confederation most expressly conveys to Congress the sole and *exclusive* right and power of determining on war and *peace*, and of entering into treaties and alliances, etc.

"When therefore a treaty is constitutionally made, ratified and published by Congress, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention, consent or fiat of state legislatures."

And further, in concluding his report, he says:

"In the present case he thinks it would be proper to resolve,

"1. That the legislatures of the several States cannot of right pass any act or acts for interpreting, explaining or construing a national treaty, or any part or clause of it; nor for restraining, limiting or in any manner impeding, retarding or counteracting the operation or execution of the same; for that on being constitutionally made, ratified and published, they become, in virtue of the confederation, part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory on them.

"2. That all *such* acts or parts of acts as may be now existing in either of the states, repugnant to the treaty of peace, ought to be forthwith repealed; as well to prevent their continuing to operate as violations of that treaty, as to avoid the disagreeable necessity there might otherwise be of raising and discussing questions touching their validity and obligation.

"3. That it be recommended to the several states, to make such repeal rather by describing than reciting the said acts; and for that purpose to pass an act, declaring in general terms, that all such acts and parts of acts repugnant to the treaty of peace between the United States and his Britannic majesty, or any article thereof, shall be and thereby are repealed; and that the courts of law and equity in all causes and questions cognizable by them respectively, and arising from or touching the said treaty, shall decide and adjudge according to the true intent and meaning of the same, anything in the said acts or parts of acts to the contrary thereof in any wise notwithstanding."

§ 61. In the Continental Congress, when the discussion of Mr. Jay's report came up, in which were incorporated the above resolutions declaring the views of the Congress as to their powers over the States in the enactment of treaties, Mr. Madison gives the following record of the proceedings on Tuesday, March 20, and Wednesday, March 21, 1787, in the Congress:¹

"Tuesday, March 20th. Mr. Jay's report on the Treaty of Peace taken up. Mr. Yates objected to the first resolution, which declares the Treaty to be a law of the land. He said the States, or at least his State, did not admit it to be such until clothed with legal sanction. At his request he was furnished with a copy of the resolution, for the purpose of consulting such as he might choose.

"Wednesday, March 21st. The subject of yesterday resumed.

"Mr. Yates was now satisfied with the resolutions as they stood. The words 'constitutionally made,' as applied to the Treaty, seemed to him, on consideration, to qualify sufficiently the doctrine on which the resolution was founded.

"The second and third resolutions, urging on the States a repeal of all laws contravening the Treaty, (first, that they might not continue to *operate* as violations of it; secondly, that questions might be avoided touching their validity), underwent some criticisms and discussions.

"Mr. Varnum and Mr. Mitchell thought they did not consist with the first, which declared such laws to be void, in which case they could not *operate* as violations.

"Mr. Madison observed, that a repeal of those contravening laws was expedient; and even necessary, to free the courts

¹ Madison Papers, Vol. II, p. 595.

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from the bias of their oaths, which bound the judges more strongly to the State than to the Federal authority. A distinction too, he said, might be started possibly between laws prior and laws subsequent to the Treaty; a repealing effect of the Treaty on the former not necessarily implying the nullity of the latter. Supposing the Treaty to have the validity of a law *only*, it would repeal all antecedent laws. To render succeeding laws void, it must have more than the *mere* authority of a law. In case these succeeding laws, contrary to the Treaty, should come into discussion before the courts, it would be necessary to examine the foundation of the Federal authority, and to determine whether it had the validity of a Constitution, paramount to the legislative authority in each State. This was a delicate question, and studiously to be avoided, as it was notorious that, although in some of the States the Confederation was incorporated with, and had the sanction of, their respective constitutions, yet in others it received a legislative ratification only, and rested on no other basis. He admitted, however, that the word 'operate' might be changed for the better, and proposed, in its place, the words 'be regarded,' as violations of the Treaty, — which was agreed to without opposition."

Mr. Curtis, in his "Constitutional History of the United States,"¹ referring to the response of the States to the action of Congress, said:

"Most of the States passed acts, in compliance with recommendation of Congress, to repeal their laws which prevented the collection of British debts. But the State of Virginia, although it passed such an act, suspended its operation until the governor of the State should issue a proclamation, giving notice that Great Britain had delivered up the western posts, and was taking measures for the further fulfilment of the Treaty, by delivering up the negroes belonging to the citizens of that State, which had been carried away, or by making compensation for their value."

In a note to this paragraph he says:

"New Hampshire, Massachusetts, Rhode Island, Connecticut, Delaware, Maryland, Virginia, and North Carolina passed such acts."

¹ Vol. I, 174.

§ 62. Mr. Madison, in the 45th number of the Federalist, sets forth the fact that the Federal Constitution differed from the Articles of Confederation not so much in the addition of new powers to the Federal Government, as in the strengthening of those powers in the Articles which were granted to the Federal Government. He says:

"The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the Articles of Confederation. The proposed change *does not enlarge*¹ its powers. It only substitutes a more effectual mode of administering them."

Chief Justice John Jay, in the 44th number of the Federalist, writes, as all the Articles in the Federalist were written, to induce the people of the United States to accept the Constitution:

"The proposed Constitution therefore has not in the least extended the obligations of treaties. They are just as binding and just as far beyond the lawful reach of legislative acts now as they will be at any future period or under any form of government."

§ 63. The above quotations show conclusively that the Congress itself believed in the complete power of the Congress, under the Articles, to enact a treaty without opposition from the States. Why then, did some States enact laws which had for their object the annulment of treaties?

The reason is plain, and is well stated by Mr. Hamilton in the 22d number of the Federalist, wherein he says:

"A circumstance which crowns the defects of the Confederation remains yet to be mentioned, the want of a judiciary power. Laws are a dead letter, without courts to expound and define their true meaning and operation. The Treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws be ascertained by judicial determinations. To produce uniformity in these determinations they ought to be submitted, in the last resort, to one supreme tribunal."

¹ Author's italics.

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This seems to have been the fatal defect in the Articles of Confederation as to their treaty-making power. Practically all writers on this subject admit that there was ample power given to the Congress by the Confederation to make treaties, but that it did not possess sufficient power to enforce them. That power could be supplied as suggested by Mr. Hamilton, and so the Constitution of the United States remedied that defect, by providing that the judicial power of the United States should extend to all questions arising under treaties. The lack of the Federal Judiciary in the Articles of Confederation was one of the most serious impediments to their efficiency; and while undoubtedly the Constitution was the outcome of a universal recognition of the need of a more effective government, this lack of efficiency was in no wise due in all cases to the lack of ample powers granted to the Congress in the Articles of Confederation; and in respect to this special power that we are considering, the treaty-making power, we feel justified in asserting that the powers of the Congress under the Articles of Confederation to enact treaties were as strong and complete as under the Constitution of the United States.

But of what avail were those ample powers if there was no judicial power to enforce them, in case of disagreement with the States? And Mr. Jefferson himself declared that one of the objects of the calling of the Annapolis Convention was not only the regulation of commerce between the States, but the adoption of some provision by which treaties, which under the Articles of Confederation were disregarded by many of the States, might be enforced by a federal Judiciary.

CHAPTER IV

TREATY POWER UNDER THE CONSTITUTION: ITS SUPREMACY
CONSIDERED IN RELATION TO OTHER SUPREME POWERS.
RULES OF CONSTRUCTION

§ 64. The consideration of the treaty-making power under the Constitution of the United States requires the consideration of the following clauses of the Constitution, which seem to be the only ones in which this power is involved:

ARTICLE VI, Clause 2. "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

ARTICLE I, § 10, Clause 1. "No State shall enter into any treaty, alliance, or confederation."

ARTICLE I, § 10, Clause 2. "No State shall, without the consent of Congress . . . enter into any agreement or compact with another State or with a foreign power."

ARTICLE II, § 2, Clause 2. "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

ARTICLE III, § 2, Clause 1. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

Out of these provisions of the Constitution relating to the treaty-making power, together with others which may conflict

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with them, will arise the real questions to be discussed in these pages.

§ 65. Article VI, Section 2, *supra*, taken by itself seems to contain a sweeping power with no restraint or limitation; and the error which has crept into the opinions of authors on this subject would seem to have come from the consideration of this clause by itself as if it were an independent, separate paper, without the important consideration that it was a part, and only a part of an instrument, which must be construed in its relation to all other sections of it in its entirety. This is an error which is often made but which has as often been exposed; nor need this view be dwelt upon because the judges of the Supreme Court from Marshall to White have insisted always that no proper construction of the Constitution can be had which does not take into consideration the unity of the whole instrument; that each of its provisions may enjoy its full powers, not by the destruction of any other, but by an interpretation which will harmonize the whole in the development of all at the expense of no one power. And, while there have been at times conflicts between State and Federal powers and difficulty in determining by which government certain powers should be exercised, the courts have not failed in determining such conflicts to recur to the contemporaneous history of the formation of the Constitution, the record of which forms an illuminating page in the true interpretation of this instrument.

§ 66. That the Constitution was a compromise in its final form cannot be denied; nor can it be claimed by the advocates of a centralized government any more than by the advocates of State Sovereignty, that their views were finally incorporated into the Constitution. Indeed, the true theory of our government is simple and adequate: that in all local matters, of which only the locality has need, the people of such locality should be supreme in determining them; while in matters of more far-reaching effect, of national character, peculiar to no one State, but of common interest to all, the stronger hand of the Federal

Government should control in the interest of all; and that the State in providing local legislation for local interests must not, under the cover of that claim, invade the domain of Federal power, nor must the Federal Government, under pretense of National legislation, deprive the States of their right of supplying the local needs of the people. These simple principles need only to be expressed to command the approval of all. The practical application of them is a more serious problem, and in the careful demarcation of the line which defines the limits of State and Federal power, the real trouble has arisen.

In National affairs we are a unit; in local matters we represent forty-eight distinct and independent units, with laws, institutions, social customs, religious affinities, and aspirations as distinct as the billows. The strength of our government has been from the beginning in the recognition of these two principles — not antagonistic, but mutually helpful when rightfully maintained; and while there have been, undoubtedly, in our history, difficulties in adjusting the exact line dividing these powers, yet, it must be admitted that the Supreme Court, with evenhanded justice, has maintained the equilibrium without a jar to the great structure, and has faithfully repelled the aggressions by each upon the other.

§ 67. So, then, when any section of the Constitution is under consideration, the recognized rule of construction not only requires the examination of the section itself, in its verbiage, punctuation, and relation to other sections — for the maxim, *noscitur a sociis* must often be invoked — but equally important and necessary to its proper interpretation is its relation to the whole instrument, in letter and spirit. The Biblical sentiment "No man liveth to himself" is no less true in its application to man in his relations to society, than is the consideration of any one section of the Constitution in its relation to all others. This same principle applies to the construction of wills, deeds, and contracts.

If, therefore, Article VI of the Constitution was presented for interpretation as an independent instrument, standing alone

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and by itself, its construction would be quite different from that which must be invoked in its construction as one section of the whole Constitution, carrying in its varied sections immutable and inalienable rights which are imbedded in its provisions, as well as in the hearts of the people. These latter rights, which pertain to the American citizen — the ready defender of his country, and the potential factor in its advancement, should surely be regarded as no less sacred and no less important than those which relate to "the stranger within our gates."

A due regard for the rights of strangers is readily accepted in the true spirit of hospitality inbred in every American, but there must be limitations upon the highest concept of hospitality. The stranger who enjoys the private hospitality of an individual can hardly be justified in abusing the rules and traditions of the home into which he is invited. The violation of any rule of propriety laid down by the master of the house would hardly be excused as a breach of decorum, under the flimsy excuse that the stranger had been invited to the house. The invitation carries with it, by distinct implication, the agreement to conform to the rules of the household — to do less would make him an intruder, rather than a guest and would justify the master in showing him the door. The Statue of Liberty at the great port of entry of our country, standing, with open arms, kindly beckoning the oppressed of every land to these shores, invites the foreigner to *our* home, established under *our* government, and controlled by *our* laws, and we ask him to come and accept these as we have developed them under our Christian civilization. And so when we come to consider Article VI, § 1, of the Constitution we must not forget the principles imbedded in the body of the Constitution as well as in the Amendments, of civil and religious liberty guaranteed to all citizens of America. In its consideration we must also keep in mind that the Tenth Amendment to the Constitution declares "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," and that this Amendment

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is a part of the Constitution, which is "supreme," and therefore is itself "supreme."

§ 68. Article VI, § 1, in the Constitution, where this power is lodged, declares "supremacy" to treaties boundless and limitless in its scope and extent; but in the same Article, side by side with this, we find this same "supremacy" granted to "this Constitution" and to "the laws which shall be made in pursuance thereof," so that "this Constitution and the laws that shall be made in pursuance thereof, and all treaties made, or that shall be made, under the authority of the United States," shall be, *each of them*, the supreme law of the land.

The effect of this "trinity in unity" of supremacy in the same paragraph has been the subject of much controversy, and no little division of opinion, by those who have considered this subject.

It would seem impossible that three unlimited, uncontrolled supreme powers could coexist in one constitution or in one government; for the grant of "supremacy" to one negatives the grant of the same "supremacy" to another; for if the grant of "supremacy" to the second be valid, it must operate as a denial of the grant to the first, for "supremacy" admits no superiority or control. When under this paragraph the laws of Congress made in pursuance of the Constitution, are made the supreme law of the land, it would seem clear that no other power could supersede or annul it, and when it is said that the treaty is the supreme law of the land, the same must be said of the law of Congress.

§ 69. The necessity of a reconciliation of these provisions was in our early history forced upon the judiciary, and in *Foster v. Neilson*,¹ and *The Cherokee Tobacco Case*,² it was decided that a subsequent treaty annulled a prior Act of Congress, and reciprocally, a subsequent Act of Congress annulled a prior treaty, showing that one supreme power could annul another supreme power: These decisions in effect prove against the clear language of Article VI, § 2, that neither is supreme,

¹ 3 Peters 314, 7 L. ed. 683.

² 11 Wall. 616, 20 L. ed. 227.

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though the language of the Constitution declared both to be supreme, *for supremacy can never be predicated of any power that can be annulled by any other.* The Court recognized in these decisions that the term "supreme" was only a relative term, and that in its construction all other coördinate powers were to be considered, and that each supreme power in the Constitution of the United States must be considered not only in reference to the language that accords it supremacy, but in its relation to all others with which that supremacy may conflict.

That a treaty may supersede a law of Congress, or the law of Congress annul a treaty, makes clear the equality of power of each, but the statement of the fact is a denial of the absolute supremacy of the one over the other.

The treaty is regarded as a law of the land. The act of one legislature may be repealed by a subsequent one. The treaty being the law of the land may therefore be annulled by a subsequent law of the land, and the boasted supremacy of the treaty finds itself restricted, and despoiled of its birthright by its foster brother, the law of Congress.

§ 70. But Article VI of the Constitution, wherein is granted supremacy to treaties, unlike the power in Article IX of the Articles of Confederation, contains a limited supremacy, a divided supremacy, divided between the supremacy of the Constitution, the supremacy of the laws made in pursuance thereof, and the supremacy of treaties. Each cannot be supreme if either one of the other powers may destroy it. The supremacy herein declared of the Constitution forbids the treaty-making power to annul any of its provisions. Its supremacy would not permit the treaty power to abrogate or annul other powers granted to any branch of the Federal Government. The long list of enumerated powers granted in this instrument to the Congress cannot be absorbed or annihilated by the treaty-making power because these powers, being parts of the Constitution, are supreme under Article VI. To hold otherwise would be to recognize only chaos and confusion in the inter-

pretation of the Constitution. A due regard to the proper construction of any instrument, requiring that all parts of it must be made effective if possible, would certainly deny the right of the treaty-making power to annihilate others equally important and equally supreme. The treaty-making power may embrace in its extent every subject or object of human action and human endeavor. And every one of these subjects, which are expressly or by implication contained in any grant by the States to the Federal Government might be a proper subject of a Constitutional treaty, if each and every one of them was either specifically assigned in the Constitution to the treaty power or if they were not specifically given by the Constitution to some other branch of the Government for its protection and care. For example, had the Constitution declared that the power to regulate commerce among the States should reside in the Federal Government without designating Congress as the repository of that power, the treaty power under such conditions could regulate commerce; for the grant of power to the President and Senate to make treaties is a general grant and not limited by any words to any special subject, and no other branch of the Government (as Congress) would by such assignment be robbed of its specific charge. But since the treaty-making power as claimed is so broad, and may embrace every right or power of the people, pertaining not only to their national but to their State and local rights, to say that this power may include the rights and powers of the citizens of the States not granted to the Federal Government, as well as the rights and powers granted to the President, the Congress, and the Judiciary, is to claim a superiority for that power over the powers of Congress, the powers of the Executive, the powers of the Judiciary, and the powers of the States, which are equally supreme with the treaty-making power. To illustrate: Article VI is the source from which the treaty-making power and the laws of Congress made in pursuance of the Constitution derive their supremacy. Exactly the same words are used to infuse into each the attribute of "supremacy." Could any authority be found to claim

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the right of Congress to pass a law which would be constitutional and valid, fixing the tenure of real estate in any State of the Union? Judge Field in his opinion in *Fox v. United States*,¹ has fixed that question irrevocably in the States; but there are those who hold that though such a law of Congress would be unconstitutional and void, yet if such were attempted under a treaty made by the United States with a foreign country, it would be valid because the treaty, under Article VI of the Constitution, is the supreme law of the land. But such treaty is not more the supreme law of the land than is the law of Congress on any subject granted to Congress. Or suppose the President in dealing with China, whose friendship and good offices we regard as important to be retained by the United States, should by proclamation or otherwise, announce to such nation rules of naturalization by which the citizens of such country could become naturalized as citizens of the United States; such a declaration on his part would be clearly unconstitutional and void because Congress alone under Article I, § 8, has the power to establish uniform rules of naturalization. If this be true, could it be claimed that a treaty between the United States and China which contains such provisions as suggested, for naturalization, would be valid and constitutional? Or suppose a Federal Judge in the trial of an Italian for robbing the United States mail should deny him the right of trial by jury, it cannot be doubted that the Supreme Court would reverse such ruling because of the Constitutional right under Article III, § 2, Clause 3, which declares the trial of all crimes, except in cases of impeachment, shall be by jury. If so, could a treaty between Italy and the United States be valid and constitutional which limited the trial of residents of each country in the courts of the other to a trial by the judge excluding the jury? This could hardly be admitted, though in view of racial feeling and local prejudice both countries might feel that their own citizens would obtain a fairer share of justice if tried before a court than before a jury. Article I, § 9, Clause 8 of the Constitution declares:

¹ 94 U. S. 315, 24 L. ed. 192.

"That no title of nobility shall be granted by the United States." This is a prohibition on the President or the Congress of the United States, or both. Can it be claimed that a treaty between Great Britain and the United States would be valid which provided for such reciprocal honors under certain circumstances to be accorded citizens of each country by the governments of the other? Article II, § 1, Clause 5, of the Constitution declares that: "No person except a natural-born citizen . . . shall be eligible to the office of President." Would a treaty between the United States and Hayti providing that citizens of Hayti born in that country should be eligible to the Presidency of the United States be valid? The Supreme Court has decided frequently that all matters which pertain to the health, morals, safety, etc., of the people in their domestic lives belong by right to the States to determine under their police power and are not included in any grant to the Federal Government under the Constitution. The State of Maine for nearly half a century, in obedience to the claims of health and morality of its people, has enacted and has preserved throughout that time on its statute books a prohibition law denying the right of sale or manufacture of intoxicating liquors within its bounds. Could it be claimed by any one that a treaty between France and the United States, giving the citizens of each country the right to engage in business in the country of the other, would be effective in the State of Maine in allowing a citizen of France to open a bar-room for the sale of intoxicating liquors?

§ 71. The language of the Constitution will be examined in vain to find that supremacy is anywhere given to any one power over all others. Article VI does not give it, for there supremacy is divided between the Constitution, the laws of Congress, and treaties. But, even if the language of Article VI, standing by itself, admitted of such interpretation, we still must recognize that for its proper construction, it must be read in relation to all other parts of the Constitution. When this is done, it is plain that no such power exists, and when the whole scheme of the instrument is taken into consideration, and the spirit of the

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times, as well as the public opinion of that day are considered, as shown in the debates in the Federal, as well as the State Conventions leading up to its adoption, the challenge may safely be made that no contemporaneous opinion or construction of the Constitution gave to any one power, however exclusive its exercise, the right to override and annihilate any or all others. If this power cannot rob Congress or the President or the Judiciary of their functions, because they, like it, are supreme in their spheres, as parts of the whole Constitution, which is supreme, by what process of reasoning can it be claimed that it may override the reserved powers of the States in the Tenth Amendment, to which also have been imparted supremacy, when Article VI declares "This Constitution . . . shall be the supreme law of the land."

§ 72. Article II, § 2, Clause 2, contains these simple words: "He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." The Legislative powers of Congress are set forth in Article I, § 8, of the Constitution, the Executive powers are detailed in Article II, the Judicial powers in Article III, and when the Constitution is finished and the enumeration of powers to Congress, and certain prohibitions on the States and on the Federal Government are completed, by way of conclusion Article VI declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made," etc., "shall be the supreme law of the land." The advocates of the supremacy of the treaty-making power over all else must eliminate that part of this Article VI of the Constitution which makes the Constitution and the laws of Congress coequal in supremacy with treaties before their claim can be admitted. The ordinary processes of construction which govern the courts must be uprooted. The grant of supremacy to the three, "This Constitution, and the laws that shall be made in pursuance thereof, and all treaties," must be construed to be a grant to one only, to wit, to treaties.

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Of what avail is it to limit the power of Congress in legislating on certain subjects if, under another power of the Constitution, whose function is not legislative, the same thing may be accomplished by the Federal Government? I need not go into the history of the Convention that adopted the Constitution just now to show the extreme jealousies on the part of many to the extension of Federal powers; and I need only refer to the great struggle before the State Conventions in the ratification of this instrument by the several States and its final ratification by these States upon the assurance that certain amendments suggested by them would be incorporated into the Constitution. The first ten Amendments were the result of this feeling, and if the claim of those to-day that the treaty-making power is supreme over the Constitution and all other powers within it can be admitted, then, indeed, has our birthright been sold for "a mess of pottage."

§ 73. By the Hamiltonian School of Statesmen it is claimed that the Constitution was the product of one body politic, — the whole mass of the people of the United States, giving the Federal Government the large powers contained therein and denying certain powers to the States, as well as certain others to the Federal Government; and that this body politic, the United States, ante-dated the States, and in effect created them, etc., etc. The Jeffersonian School holds that the States, prior to the adoption of the Constitution, existed as independent sovereigns; that they created the Constitution by proposing it to the people of the several States, who ratified it, and that from the reservoir of their original powers they granted certain ones to the Federal Government, denied others to the States, reserving all others "to the States respectively, or to the people." While historically we hold the latter view, the adoption of either will serve our purpose in showing that the reserved rights under the Tenth Amendment, secured in either of the above mentioned methods can no more be taken from the States than can any power granted to the Federal Government be taken from it. Under the Hamiltonian School each power, Federal and State,

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has a common origin and a common grantor; each is a part of the same Constitution, each is supreme in its sphere because the Constitution, which embraces both, is confessedly supreme. There is one reservoir from which flowed all powers, the people of the United States as one body politic. This same body politic delegated the enumerated powers as given in the Constitution to the various departments of the Federal Government, and then declared that all powers not delegated were reserved "to the States respectively, or to the people"; and when the Constitution was pronounced the supreme law of the land this supremacy was infused into every part of it, into every section and every paragraph of it. The supremacy of the judicial power, of the legislative power, and of the executive power in the Federal Government in their respective spheres, was complete and unchallenged; while the powers not delegated, but which were reserved "to the States respectively, or to the people," were left undisturbed by the Constitution as not needed by the Federal Government; and because the supremacy of the Constitution declared in Article VI pervades every part of it, and the Tenth Amendment is as much a part of it as Article VI, or any other section of that instrument, the reserved powers contained therein are, in their sphere, equally supreme, and subordinate to no other power in the Constitution.

§ 74. By the Jeffersonian School it is held that the Constitution was proposed by the thirteen original States as independent bodies politic. Each gave up certain of its original sovereign powers to the Federal Government and for the good of all denied to the States the use of certain other powers. They gave freely of national powers, denied themselves without stint, and left in the possession of each State or with the people all other powers. They gave part and retained part. They gave up national powers and retained local powers. So that without the declared supremacy of the Constitution in Article VI these reserved powers referred to in the Tenth Amendment were supreme in their sphere. With Article VI they are doubly so.

Judge Cooley¹ strongly confirms our view:

"To ascertain whether any power assumed by the government of the United States is rightfully assumed, the Constitution is to be examined in order to see whether expressly or by fair implication the power has been granted, and if the grant does not appear, the assumption must be held unwarranted. To ascertain whether a State rightfully exercises a power, we have only to see whether by the Constitution of the United States it is conceded to the Union, or by that Constitution or that of the State prohibited to be exercised at all. The presumption must be that the State rightfully does what it assumes to do, until it is made to appear how, by constitutional concessions, it has divested itself of the power, or by its own Constitution has for the time rendered the exercise unwarrantable."

§ 75. But it is urged that the language of the Constitution placing the treaty-making power in the President and Senate, with no limitations upon its scope, but merely declaring that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," shows that there is no limit to the subjects or rights which may be incorporated in a treaty. That had the framers of the Constitution intended any limitations they would have been made, just as the subjects upon which Congress can legislate are specifically enumerated in the Constitution. A moment's consideration will show that the difference between the two is palpable. A treaty, generically, is an agreement or contract between two nations, which may embrace any subject or right incident to the citizenship of either country. An enumeration of subjects or objects which could properly be contained in a treaty would therefore be practically impossible. But the legislative powers of Congress, being few, could be easily enumerated. Mr. Rawle, in speaking of this matter, says:

"To define them (the subjects of a treaty) in the Constitution would have been impossible, and therefore a general

¹ Cooley's "Constitutional Law," p. 31.

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term could only be made use of, which is, however, to be scrupulously confined to its legislative interpretation."¹

§ 76. Mr. Calhoun also says of this:

"The reason is to be found in the fact that the treaty-making power is vested exclusively in the government of the United States; and, therefore, nothing more was necessary in delegating it than to specify, as is done, the portion or department of the government in which it is vested. It was then, not only unnecessary, but it would have been absurd to enumerate, specifically, the powers embraced in the grant. Very different is the case in regard to legislative powers. They are divided between the Federal Government and State Governments; which made it absolutely necessary, in order to draw the line between the delegated and reserved powers, that the one or the other should be carefully enumerated and specified; and, as the former was intended to be but supplemental to the latter, and to embrace the comparatively few powers which could not be either exercised at all, or, if at all, could not be so well and safely exercised by the separate governments of the several States, it was proper that the former, and not the latter, should be enumerated and specified. But, although the treaty-making power is exclusively vested and without enumeration or specification in the government of the United States, it is nevertheless subject to several important limitations."²

§ 77. It would be to convict the framers of the Constitution of a lack of foresight, which cannot properly be imputed to them, to suppose they intended to give to this treaty-making power unlimited scope to absorb every right of the people of the States, against which they had so carefully guarded in the enumeration of the powers of Congress and by the reservations in the Tenth Amendment. The powers of Congress, the Executive, and the Judiciary were enumerated in detail. And all powers not granted were, under the Tenth Amendment, reserved to the States or to the people respectively. Of what avail is it to know that the Framers of the Constitution securely pre-

¹ Rawle, "View of the Constitution of the United States," 2d Ed., p. 64.

² See Chapter I, pp. 5, 9, for these limitations.

served to the people their sacred local rights from the grasp of Congress, the President, or the Judiciary if they can be absorbed under the treaty-making power? If the Federal Government can take them, it matters little what department may claim the right. A man who is robbed of a precious jewel of great price, dear to him by the ties of every sacred association, cannot be comforted in his loss by the knowledge that a different person from the one he supposed to be the thief was really his despoiler.

§ 78. In the Constitutional Convention this clause seems to have been but little discussed, and such discussion as was had was not so much as to the scope and extent of the power as to where it should be lodged in the Federal Government. But the debates in the several State Conventions are more illuminating and instructive. The authors of the *Federalist*, Mr. Jay, Mr. Hamilton, and Mr. Madison, contributed in the several numbers of that publication their general views on the subject. But even in these dignified pages we find nothing of especial interest from any of the three authors. Mr. Jay, it is true, in the 44th number, in discussing this power and its relations to the law-making power lays down a principle which seems to be persuasive but which the Supreme Court has repeatedly overruled. Mr. Hamilton, as in all things pertaining to the Constitution, wanted strength and exclusive strength for this power. In the 22d number of the *Federalist*,¹ in speaking of the crowning defect of the Confederation being the lack of any judicial power, he says:

"Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States to have any force at all must be considered as part of the law of the land. Their true import as far as respects individuals must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations they ought to be submitted in the last resort to one supreme tribunal."

¹ Ford's Edition, p. 140.

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In Number 23 of the *Federalist*, Mr. Hamilton uses this language in speaking of the Federal powers, including that of the treaty-making power: they

"ought to exist without limitation because it is impossible to foresee or define the extent or variety of national exigencies or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be more extensive with all the possible combinations of such circumstances; or to be under the direction of the same councils which are appointed to preside over a common defence."

§ 79. Mr. Madison, in the 45th number of the *Federalist*, uses this language:

"The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the Articles of Confederation. *The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.*"¹

Mr. Madison's views were more elaborately expressed in the Virginia Convention of 1788, called to ratify the Constitution.

§ 80. In the enumeration in Article I, § 8, of the powers of Congress, with first the power "to lay and collect taxes, duties, imposts, and excises," we find the words "taxes, duties, imposts, and excises" have a meaning confined within certain well defined limits; in the power to regulate commerce with foreign nations and among the several States, while the words "commerce among the several States" embrace a large field of action, they are yet limited within the definite meaning which attaches to the word "commerce"; so as to the powers to establish uniform rules of naturalization and to coin money, to establish post-offices and post-roads, to declare war, to raise and support armies, to provide and maintain a navy, etc. These are all powers granted to the Federal government, and as to which the States are excluded generally from exercising any

¹ Author's italics.

jurisdiction; certainly excluded after the Congress finds it necessary or convenient to make any one of them an exclusive subject of its own power.

Each one of these powers of Congress may embrace many collateral objects which are included in the original generic term in which the grant is made, but still each is confined to that specific grant, and is not, by the well established rule of judicial interpretation, allowed to transcend these boundaries. After Article I, § 8, has exhausted itself in grants of power to the Congress in the eighteen successive paragraphs of that section, (which practically embraces the whole grant of powers to Congress in the Constitution) we find these powers belong to Congress alone and can be used by no other arm of the Government, for Article I, § 1, clause 1, declares "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

§ 81. Having thus laid down what legislation Congress shall be empowered to enact, the Tenth Amendment, as part of the Constitution, declares "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Sixth Article makes the laws of the United States made in pursuance of the Constitution, supreme. The grants of power in Article I, § 8, are exclusive (as well as supreme) when Congress chooses to so make them. Any power which may otherwise legitimately be used by a State, must yield to the Federal power on the same subject, when Congress deems it necessary and wise to use it, but all State powers (and they are almost limitless in number) not granted to the Federal Government, are free from the control of Congress, and are as supreme as any powers granted to the Federal Government, because they are included in the Tenth Amendment, a part of the Constitution, and the Constitution, by Article VI, is itself declared to be the supreme law of the land; and for the further reason that they are the original sovereign powers of the States, left untouched by the Constitution in the possession of the States or the people.

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It seems to be overlooked by many writers that these reserved rights of the States, local it may be in their nature and scope, having no application outside of their own State, are by the very language of the Constitution, made *as supreme as laws of Congress or of treaties made under the authority of the United States*: for when Article VI declares that this Constitution shall be the supreme law of the land, it does not mean simply that the laws of Congress are to be supreme, or that treaties are to be supreme, but that every part and every section of that Constitution is the supreme law of the land. Those rights of the States being all of the rights that inhere in any State, except such as were given up and enumerated in the Constitution itself, not only have the vigor and force which inhere in them as powers of a sovereign State, but they have the additional strength of supremacy infused into them by the very language of the Constitution itself.

§ 82. Under Article II the powers of the executive are defined with precision and exactness, and his duties and powers enumerated and restricted. Article III is devoted to the judicial power of the United States, describing and limiting its power and functions, and other sections of the Constitution place prohibitions upon the powers of the United States, as well as of the States, while the Amendments thereto secure to the citizens of the United States certain civil and political rights which cannot be taken from them, except by change of the Constitution. We are justified, therefore, in holding that a careful examination of the whole instrument shows unmistakably an intention to place nowhere in the government of the United States or of the States any one supreme and uncontrollable power. The division of the functions of government between the Federal government and the States, the limitations on each, the prohibitions on both, all show the conclusiveness of this assertion; but the Sixth Article, which grants supremacy to this Constitution, to the laws of Congress made in pursuance thereof, and to treaties made under the authority of the United States, it is now claimed by some writers was inserted in the Constitu-

tion near its close — after the powers of the Federal government and those of the States had been delicately adjusted, for the purpose of securing a national government that would deal with national affairs and State governments that would conserve their peculiar local needs, — to supersede and destroy what had already been accomplished.

The laws of the United States could not do it, for the objects for which the Federal government could legislate had been specifically enumerated, but since a treaty may embrace any subject, and some of those subjects may be included in the grants to Congress, while others may be among the reserved powers of the States secured in the Tenth Amendment, it is argued that all these must be included in the treaty power, and that when it acts with the insignia of supremacy attached to it, it sweeps away every prohibition and limitation that may have been prescribed in the Constitution.

§ 83. Great weight is attached by some writers to the fact that Article VI specifically declares that treaties and laws of Congress are to be the supreme law of the land. When Article VI declares "This Constitution . . . shall be the supreme law of the land," the words are sufficient without any other declaration as to the laws of Congress or treaties to make them the supreme law of the land; because the laws of Congress and treaties made under the authority of the United States emanate from the Constitution, and when the Constitution is declared to be the supreme law of the land, every part of it is supreme. The insertion of the words "the laws of Congress," and "all treaties made," in Article VI, serves to emphasize the supremacy of the powers of Congress and of treaties, but certainly no more strength is given to either by these words, for the words "this Constitution shall be the supreme law of the land" makes each equally supreme.

§ 84. The real difficulty in the construction of Article VI is found in the scope and breadth of the word "Treaty." The power to regulate commerce restricts all such regulations to conditions that arise from commerce; to establish post-offices

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and post-roads, gives to Congress only the power to legislate on those subjects or those which naturally flow from it, but the word treaty, which may embrace any subject, in its very nature, has no such limitation. It is as broad and conclusive as national ambition or human activities could make it. Every personal right, every property right, every civil right, every political right, every social right, every religious right known to the American citizen may be included in its ample folds. All of these, as applied to the citizens of the United States and the States, had been adjusted by the Constitution before Article VI was reached and the question which is to be answered in America to-day is whether the framers of the Constitution, after spending weeks and months in erecting a structure which was to protect these rights, and after their work had been practically accomplished, intended by the insertion of this Article, to destroy the structure they had so successfully builded.

§ 85. If we are to accept, therefore, the literal meaning of the words in Article VI, as applied to treaties, and give to them the supremacy which it is claimed the letter of the Constitution accords them, what is the result? In the first place, every power delegated to the Congress of the United States for its execution may be surrendered to the treaty power. The purpose which the framers of the Constitution had that the imposition of taxes, the regulation of commerce, the establishment of post-offices and post-roads, the coining of money, the naturalization of foreigners, and the like, should be accomplished only through the action of representatives elected by the people of the States, and the Senators representing the States, is abandoned and the powers are surrendered to the President and the Senate in the making of treaties with foreign countries; in the second place, after providing, as was their intention, for a republican form of Government, it must be presumed they deliberately inserted Article VI to change that form to the government of an oligarchy; and, thirdly, that after they had determined in their wisdom to concede to Congress powers of legislation in certain particulars, and that all else was to be left with the States

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or the people, who were supposed to know better than anyone else what was best for them in their respective localities, they deliberately reversed their action and inserted this article, which might exclude their representatives in Congress from a voice in any legislation, and give to the President and the Senate the power to uproot and destroy what had already been conceded to Congress and the States. And all this results, it is claimed, because the word "Treaty" may embrace any subject that pertains to the people as citizens of the State or Nation.

§ 86. St. George Tucker, Story, Rawle, Willoughby, Pomeroy, and Cooley, and every reputable writer upon the Constitution, declare that the treaty-power can do nothing which tends to destroy the Constitution itself. Can it be doubted that the power to take away the right of Congress to legislate, or the right of the people of the States to regulate their own local affairs is the power to destroy the basic principles of the Constitution of our country?

§ 87. The claim asserted for the treaty-making power that it may embrace all rights and all subjects because the word "Treaty" may embrace such, cannot be maintained for another reason. The principle must be accepted as established, that where in any instrument a *general* grant is made, which is followed in the same instrument by a *specific* grant, that the "general" is limited by the "specific" grant. This is undoubtedly true of wills and deeds. A testator who devises *all* of his real estate to his wife and in a subsequent portion of his will devises his home place to his son, is considered to have limited the devise of *all* of his real estate to his wife by the *specific* devise of the home place to his son. The same principle will apply to a deed of real estate.

This principle applies peculiarly to the case of the treaty power. Article II, § 2, grants to the President and Senate the power, without any limitation, to make treaties; since treaties may embrace all rights of person and property, some of which may be included in the powers granted in the same Constitution, to the President, to the Congress, the Judiciary, and some

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also, which by the same instrument, are reserved to the States, this would seem to be a sweeping and unlimited general grant to the treaty-making power; but when we find the same instrument, which has made this unqualified *general* grant to the treaty power, has granted to the President, to the Congress, to the Judiciary, certain specific powers, and reserved to the States certain *specific* powers and rights, the *general* grant to the treaty-making power is limited by the *specific* grants mentioned. This is the well-established rule of construction, and to hold otherwise would be to hold that the Convention, after carefully constructing a constitutional government, granted to one of the branches of the government the power to destroy it all.

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CHAPTER X

THE RELATION OF THE TREATY-MAKING POWER TO THE
POLICE POWER OF THE STATES

§ 246. This division of our subject is as follows:

Personal and property rights of every kind and description may be the subject of treaties. Whenever the control or protection of such rights is, under the Constitution, confided to any department of the government ¹ or to a *State*, such department or *the State*, as the Constitutional repository of such rights, cannot be ousted of their jurisdiction and have the same transferred to the treaty-making power.

The guarantee of certain personal and civil rights to the citizens of the United States and the prohibition on the United States to deny others to the people, as set forth in the Constitution, and in the Amendments thereto, has been discussed elsewhere.

This branch of our subject, however, is more limited, and we are now to consider in addition to the rights specifically secured in the Constitution and the Amendments, those rights which may pertain to the citizen as a citizen of a State. And this touches upon the dual status of citizenship, which pertains to every citizen in the State; a status unknown in many countries, and which to those who are unacquainted with our system of government is difficult to comprehend, for every citizen of the United States is entitled to the protection of the Federal Government in all matters which pertain to his citizenship of the United States, and every citizen of a State in the United States

¹ Rights confided to the various departments of the government have been considered in Chapter V.

is entitled to like protection of all rights which pertain to him as a citizen of such State.

§ 247. The one man owes allegiance to two powers, the Government of the United States, and the Government of his State, for he is a citizen of each. In the discharge of duties pertaining to the government of the United States or in the transaction of business which pertains to the government of the United States, wherever in fact his actions touch a right or duty which comes to him from the government of the United States, he is exercising rights or duties as a citizen of the United States. And so where he is performing a duty that comes to him as a citizen of the State and not of the United States, or is engaged in any business which does not touch the government of the United States in any respect, but which is controlled and derived from the State itself, in such capacity he is acting as a citizen of the State and as such entitled to the protection of the State. If a man goes into the Federal Court to practice law, he goes as a citizen of the United States; if he goes into the State Court to practice law he goes as a citizen of the State.¹ The recognition of this dual citizenship is merely a recognition of the division of the powers of government in the United States. In the *Slaughter House Cases*,² the Court defined the rights of a citizen of the United States as follows: "Those which owe their existence to the Federal Government, its national character, its Constitution, or its laws." Chief Justice Waite in *United States v. Cruikshank*³ says:

"We have in our political system of the United States the government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance and whose rights it must protect. The same person may be at the same time a citizen of the United States and a citizen of the State, but his rights of citizenship under one of these governments will be different from those he has under the other."

¹ *Bradwell v. State*, 16 Wallace, 130, 21 L. ed. 442.

² 16 Wallace, 36, 21 L. ed. 394.

³ 92 U. S. 542, 23 L. ed. 588.

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§ 248. What rights, then, peculiarly belong to the citizen as a citizen of the State? The Tenth Amendment to the Constitution fixes these: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." These reserved powers, or the rights flowing from them, are those with which the citizen of the State is clothed, and which he, as such citizen, has the right to enjoy under the control of the State. Among these reserved powers may be included the police power of the State. The Tenth Amendment does not create powers, it merely protects certain powers from aggression by the Federal Government. If the Tenth Amendment had never been adopted, it would still be true that the police powers of the State would exist, for they are inherent powers in every State that cannot be surrendered, and so these reserved powers often include the original, inherent police powers of the State. Judge Cooley has well stated the principle:¹

"In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States. All that the Federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal Constitution."

And he adds:

"But while the general authority of the State is fully recognized, it is easy to see that the power might be so employed as to interfere with the jurisdiction of the general government; and some of the most serious questions regarding the police of the States concern the cases in which authority has been conferred upon Congress. In those cases it has sometimes been claimed that the ordinary police jurisdiction is by necessary

¹ "Constitutional Limitations," 831 (Seventh Edition).

implication excluded, and that, if it were not so, the State would be found operating within the sphere of the national powers, and establishing regulations which would either abridge the rights which the national Constitution undertakes to render absolute, or burden the privileges which are conferred by law of Congress, and which therefore cannot properly be subject to the interference or control of any other authority. But any accurate statement of the theory upon which the police power rests will render it apparent that a proper exercise of it by the State cannot come in conflict with the provisions of the Constitution of the United States. If the power extends only to a just regulation of rights with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the State, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities."

§ 249. Writers upon the Constitution and judges of our Courts show great reluctance in attempting a definition of the police power of the State. And it is only therefore from the opinions of the judges that we are enabled by the doctrine of comparison and exclusion to get a satisfactory view of this power. In these opinions we find many of the attributes of this power, but no definition of it, and without defining its limitations, we find many things it can do and much that it cannot do. The police power of a State may be said to be that unlimited, inalienable, inherent power in every State to protect the health, the safety, and the morals of the people, and to preserve and protect its own autonomy at all times. Once admit the existence of a State with its essential duties and obligations and any one of such essential duties or obligations becomes a proper subject for the application of the police power. The police power of a State is the power of self-preservation; its defensive weapon against destruction. It inheres in all those functions and powers whose exercise is necessary to the existence of a State. The distinction between *necessary* and *essential*, and *appropriate* powers and functions, must be observed. The

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latter may not be included in the police power, the former must be. A watch, though lacking a proper regulator, or part of its case, or some other part of its mechanism, is none the less a watch; but if the mainspring be gone, its function as a watch is destroyed, for it can no longer be considered a "going concern." The lack of a regulator undoubtedly affects the accurate measurement of time, but the absence of the mainspring makes any measurement of time impossible. In other words, the purpose for which the watch is made is gone. The regulator as a part of its mechanism is indeed eminently appropriate but not essential to its existence as a watch, for the same watch may keep time even if it be not accurate time, but without the mainspring *no* time can be kept. And, so, wherever the duty or obligation of the State embraces a subject that constitutes one of the essential and necessary attributes of the State, to this subject the police power attaches. If the subject be one that appropriately, but not essentially, inheres in the State, to this the police power may not necessarily attach.

§ 250. In *Beer Co. v. Massachusetts*,¹ Justice Bradley holds that the police power of the State cannot be surrendered by any act of the Legislature. He says:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

This was the unanimous opinion of the Court carrying with it the sanction of such names as Chief Justice Waite, and

¹ 97 U. S. 32, 33, 24 L. ed. 989.

Justices Clifford, Miller, Strong, Hunt, Swayne, Field, and Harlan.

Judge Cooley again says:¹

"It has also been intimated in a very able opinion that the police power of the State could not be alienated even by express grant. And this opinion is supported by those cases where it has been held that licenses to make use of property in certain modes may be revoked by the State, notwithstanding they may be connected with grants and based upon a consideration. . . . It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the State cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well-being of organized society; and that any contracts to that end are void upon general principles, and cannot be saved from invalidity by the provision of the national Constitution now under consideration."

§ 251. Adopting Judge Cooley's views, *supra*, Chief Justice Waite delivered the opinion of the Court in *Stone v. Mississippi*.² The case involved a charter granted by the Legislature of Mississippi in 1867 to a Lottery Company for twenty-five years in consideration of a stipulated sum and annual payments, etc. In 1868 the State of Mississippi adopted a Constitution which prohibited lotteries within the State. The question therefore was whether the charter granted by the legislature was such a contract binding upon the State that the subsequent Constitution adopted by the State could not destroy. Chief Justice Waite said in his opinion:

"Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State and the people of the State in that way. All agree that the legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can cur-

¹ "Constitutional Limitations," 399, 400 (Seventh edition).

² 101 U. S. 817, 25 L. ed. 1079.

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tail the power of its successors to make such laws as they may deem proper in matter of police. . . . Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657; *Boyd v. Alabama*, 94 U. S. 645. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. *Beer Company v. Massachusetts*, 97 U. S. 25; *Patterson v. Kentucky*, 97 U. S. 501. Neither can it be denied that lotteries are proper subjects for the exercise of this power."

And he further said:

"The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. *Beer Company v. Massachusetts supra.*"

The Chief Justice, when commenting on Chief Justice Marshall's opinion in the Dartmouth College Case wherein he said, "That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed," continued:

"The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of

the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular. But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.' They may create corporations and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. . . . Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will."

There was no dissent in this case, and the opinion of the Chief Justice, therefore, is enforced by the sanction of the whole

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court, composed of Justices Clifford, Miller, Strong, Hunt, Swayne, Field, Bradley, and Harlan. ¹

§ 252. Two notable cases have contributed much to a proper understanding of this power, in one of which Chief Justice Shaw, and in the other Chief Justice Redfield, rendered the opinion. Chief Justice Shaw said: ¹

"The police power is that power vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances either with penalties, or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same. It is easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well ordered governments, and where its fitness is so obvious that all well regulated minds will regard it as reasonable."

§ 253. Chief Justice Redfield, in *Thorpe v. Rutland & Burlington R. R. Co.*,² delivering the opinion of the Court, said:

"The case resolves itself into the narrow question of the right of the legislature, by general statute to require all railways, whether now in operation, or hereafter to be chartered, or built, to fence their roads upon both sides, and provide sufficient cattle-guards at all farm and road-crossings, under penalty of paying all damage caused by their neglect to comply with such requirements. . . . We think the power of the legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is, by the fifth article of the bill of rights of this State, expressly declared to reside perpetually and inalienably in the legislature, which is, perhaps, no more than the enunciation of a general principle applicable to all free States, and which cannot, therefore be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given

¹ *Commonwealth v. Alger*, 7 Cushing, 85.

² 27 Vt. 140.

to railroads to be carried into effect by their by-laws and other regulations, it is, of course, always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of, if they would. So far as railroads are concerned, this police power which resides primarily and ultimately in the legislature, is twofold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes, and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railroads in the State to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all of their railroads to come to a stand before passing draws in bridges; or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reasoning may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is especially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances. There would be no end of illustrations upon this subject. . . . It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axletrees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. *Hegeman v. Western Railway Co.* 16 Barb. 353.

"2. There is also the general police power of the State, by

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which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, of the perfect right, in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question."

¹ And the court proceeded to consider the various cases in which the right of the legislature to regulate matters of private concern with reference to the general public good had been sanctioned or sustained by judicial decisions, and quote, as pertinent to the general question of what laws are prohibited on the ground of impairing the obligation of contracts, the language of Chief Justice Marshall in *Dartmouth College v. Woodward*,¹ that,

"The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed."

§ 254. Another very striking case is that of the *Commonwealth v. Vrooman*,² in the opinion of which the following language was used in speaking of the police power:

"It is inherent in all forms of government. Its exercise may be limited by the frame or constitution of a particular government, but its natural limitations, in the absence of a written constitution, are found in the situation and necessities of the State, and these must be judged of in the first instance by the government itself. It corresponds to the right of self-preservation in the individual. When the dangers that threaten the State come from without, the right of self-preservation is exercised in gathering armies and the means of public defense. When the dangers arise within the State, self-preservation requires their suppression. This is accomplished by the exercise of the police power which deals with all forms of disorder, and provides for the public welfare, and the protection of citizens against the violence and fraudulent conduct of each other."

¹ 4 Wheat. 518, 629, 4 L. ed. 629.

² 164 Pa. 306, 30 Atl. 217.

§ 255. In the City of New York *v. Miln*,¹ the question was whether an act of the State of New York which inflicted a penalty upon the master of a vessel arriving from a foreign port who neglected to report an account of his passengers was a regulation of commerce or of police. Justice Barbour, in delivering the opinion of the court, uses this language:

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.

"We are aware, that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering.

"If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights, or their duties; whether it respected them as men, or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a State, or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction."

¹ 11 Peters, 139, 9 L. ed. 648.

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§ 256. The application of these principles to certain prohibitions under the Constitution is of interest. Article I, § 10, clause 1, of the Constitution, reads:

"No State shall . . . pass any law impairing the obligation of contracts."

This provision, on its face, seems clear and unlimited. The word "any" would seem to make the prohibition absolute. There is no limitation on the word "contracts" so that it would seem to include all.

In the Dartmouth College case¹ it was held that New Hampshire succeeded to the royal prerogative and was bound by the royal compact in its charter, and that that charter constituted a contract which could not be impaired by any subsequent act of the legislature of the State.

But in the cases cited above, *Beer Co. v. Massachusetts*, *Boyd v. Alabama*, and *Stone v. Mississippi*, a limitation is put upon this clause in its seeming simplicity, and in those cases the courts held that an unheralded power, of unknown parentage, *nullius filius* in the political world, known as the police power of a State had its application. The courts did not hold that this power could be asserted successfully to annul this clear constitutional provision; they did not claim it could override the Constitution if in conflict with it, this was not necessary, but they held that when this provision said "No State shall pass any law impairing the obligations of contracts," they must with due regard for the States, recognize their essential attributes without which they would not exist as States. It was not held that the police power annulled this provision of the Constitution, but that this provision, properly construed in its relation to the essential powers and duties of the State, simply recognized those duties as inhering in the State, because the States could not exist as States without them. And so, they held that the duty and obligation resting on the States in the preservation of the health, safety, and morals of the

¹ 4 Wheat. 463, 4 L. ed. 629.

people as one of its essential and necessary attributes could not be and was not surrendered, and that every charter or contract made by a State, even for a consideration, is subject to annulment and repeal by this power under these obligations.

In brief, the Constitutional provision does not apply where the police power of the State is necessary for the protection of the people; and this is done without conflict simply by recognizing the States as clothed with those attributes and powers, without which no State can exist, and which are essential to its existence. Indeed, the construction given this provision of the Constitution by the courts in effect makes it read "No State shall pass any law impairing the obligation of contracts," *except such laws as are necessary for the protection of the health, morals, etc., of the people*: for since the protection of the health, morals, etc., of a people is one of the essential duties of the State, it can neither by contract nor concession of any kind, whether for value or without, divest itself of this obligation. To do so would be to abdicate; to part with it would be State suicide; impossible under the decision in *Texas v. White*¹ that declares our government to be "an indestructible union composed of *indestructible States*"; and which was reaffirmed in *Collector v. Day*.² "Without them (the States) the general government itself would disappear from the family of nations."³

§ 257. The same principle has been applied in the construction of liquor legislation. The State cannot be divested of its police power in its duty to the people for it pertains to every species of property within its domain and subject to its jurisdiction; and so, if a package of liquor (prohibited by a State from manufacture or sale within its borders) while in commerce and under Congressional control (and which therefore has not become subject to the control of the State) comes within the territorial confines of a State, so long as it continues as an article of commerce it is beyond the reach of the police power for it has never as yet become a part of the property of the State

¹ 7 Wall. 700, 19 L. ed. 227.

² 11 Wall. 125, 20 L. ed. 122.

³ *Lane v. Oregon*, 7 Wall. 76, 19 L. ed. 101.

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to which such power could attach. But, once let commerce in the article cease and the commerce-power take its hands off of it and it drops into the mass of the property of the State and the police power at once attaches. While in commerce it may be *in* but not *of* the State, and until it becomes a part of the property of the State the police power of the State does not attach to it.¹

§ 258. Another striking illustration of this power is seen when the Federal government grants licenses to manufacture or sell liquor to a citizen of a State, which State has by constitutional prohibition or legislative enactment denied the right within its boundaries. Here we have the permission of the Federal government to do an act which is prohibited in the jurisdiction to which the license applies. Such license is valueless in its power to force upon an unwilling community that which the State has decided would be detrimental to the health and morality of the people. The manufacture and sale of liquor cannot be accomplished without such Federal license, but it cannot be done with it if the State under its police power denies the right.²

§ 259. Laws affecting and regulating ports of entry in the powers given to harbor masters to designate suitable places for the anchoring of vessels, regulation of wharfs, etc., have been the subject of adjudication by the courts. It is easily seen that such laws passed by a State to control the harbors of their ports wherein the commerce of the world may come, do in a measure affect commerce; but not every State law that affects commerce is unconstitutional. If enacted in good faith for local purposes (though they affect interstate commerce) with no purpose of impinging on rights controlled by Congress and are "*bona fide* appropriate" to the end in view they are held valid.³

¹ *Loisoy v. Harding*, 135 U. S. 100, 34 L. ed. 128, 10 S. C. 681; *Dowman v. Rwy.* 125 U. S. 465, 31 L. ed. 700, 8 S. C. 689.

² *License Cases*, 5 Wall. 462, 18 L. ed. 497; *Heff v. U. S.* 197 U. S. 505, 49 L. ed. 848, 25 S. C. 512.

³ *Cooley*, "Constitutional Limitations," 7 Ed. 855.

Judge Field, in *County of Mobile v. Kimball*,¹ has well stated the doctrine:

"Of the class of subjects local in their nature, or intended as merely aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys and beacons to guide mariners to the proper channel in which to direct their vessels."

§ 260. Quarantine laws and inspection laws have also been approved under the police power of the State. They necessarily affect commerce in one sense, but not so in the sense contemplated by the Constitution. When the State at its boundary meets an article of commerce which seeks admission to its territory, with the demand for inspection, commerce, it is true, is stopped: the inspection is for the purpose of determining whether there may or may not be disease or contagion in the article, which is sought to be introduced. If the inspection discloses such disease or contagion, the article cannot enter, but commerce is not stopped by this proceeding, but disease and contagion are. The object of such laws is therefore to aid commerce, not to impede it; to expedite lawful commerce, and to prevent commerce from being used as a vehicle of disease and death. The police law of the State cannot then be considered as excluding rightful commerce, but only as excluding disease and impurity against which the police power of the State is directed in the protection of the people of the State.²

§ 261. We have sought above to draw the distinction between necessary and essential, and appropriate powers of a State in its relation to the police power, for many powers confessedly appropriate in their exercise by a State may yet not be regarded as powers absolutely essential to its autonomy. Justice Bradley

¹ 100 U. S. 696, 697, 25 L. ed. 761.

² *Missouri, K. & T. R. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 S. C. 488; *Smith v. R. R.* 181 U. S. 248, 45 L. ed. 847, 21 S. C. 603; and especially *Rasmussen v. Idaho*, 181 U. S. 200, 45 L. ed. 814, 21 S. C. 557.

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in giving the opinion of the court in *Crutcher v. Kentucky*¹ says:

"But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce. . . . There are undoubtedly many things *which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce*, or to be able to claim it only in a modified way. *Such things are properly subject to the police power of the State.*"² Chief Justice Marshall, in *Brown v. Maryland*, 12 Wheat. 419, 443, instances gunpowder as clearly subject to the exercise of the police power in regard to its removal and the place of its storage; and he adds: "The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State."

And further, at page 61, he says:

"But whilst it is only such things as are *clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress*,² yet when that power, or some other exclusive power of the Federal Government, is not in question, the police power of the State extends to almost everything within its borders."

And further:

"It is also within the undoubted province of the State legislation to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns: with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of

¹ 141 U. S. 59, 35 L. ed. 649, 11 S. C. 851.

² Author's italics.

people may be endangered, even though such regulations affect to some extent the operations of interstate commerce."¹

This opinion has the endorsement, by concurrence, of Justices Field, Harlan, Lamar, Blatchford, and Brewer. Chief Justice Fuller and Justice Gray dissented, and Justice Brown did not sit in the case.

§ 261a. In the case of *Railroad Co. v. Husen*,² Justice Strong says:

"While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property, within its borders; while it may prevent persons and animals suffering under contagious or infectious disease, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, *beyond what is absolutely necessary for its self-protection*.¹ It may not, under cover of exerting its police powers, substantially prohibit either foreign or interstate commerce."

And further, at page 473, he says:

"The police power of the State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise."¹

Judge Strong, in this case, clearly recognizes the fact that, while the police power cannot be used for self protection beyond what is absolutely necessary for the preservation of the State, as a State, yet up to that point it is subject to no diminution of power. This was the unanimous opinion of the Court composed of Chief Justice Waite, Justices Clifford, Miller, Hunt, Field, Swayne, Bradley, and Harlan.

§ 262. The case of *Railroad v. Fuller*³ is of interest in showing how far the police regulations of a State may affect interstate traffic. A statute of Iowa declared:

"In the month of September, annually, each railroad company shall fix its rates of fare for passengers, of freights for

¹ Author's italics.

² 95 U. S. 472, 24 L. ed. 508.

³ 17 Wall. 500, 21 L. ed. 710.

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transportation of timber, wood and coal per ton, cord, or thousand feet, per mile, also its fare and freight per mile, for transportation of merchandise and articles of the first, second and third and fourth grades of freight. And on the first day of October following shall put up at all the stations and depots on its road a printed copy of such fare and freight, and cause a copy to remain posted during the year."

For neglect to do so a fine was imposed. The railroad undertook to transport for Fuller certain goods covered by the law of Iowa, from Chicago to the State of Iowa, and charged him in excess of the rates posted in the local depots of Iowa. The Court held that the railroad was liable to Fuller, though it claimed that the act of Iowa was an interference with interstate commerce and therefore null and void. It is true that the statute of Iowa operated on interstate commerce, but it was designed in good faith to protect the citizens of that State from imposition by the railroads in intrastate commerce. That was its chief concern, but still it was not limited to that and did embrace interstate commerce, and yet it was held to be a valid law in the exercise of the police power of the State in the protection of its citizens. Justice Swayne's opinion was the unanimous opinion of the court composed of Justices Clifford, Miller, Field, Bradley, Davis, Strong, and Hunt.

§ 263. The case of *Plumley v. Massachusetts*¹ involved the validity of a statute of Massachusetts passed "to prevent deception in the manufacture and sale of imitation butter," the question being whether such act contravened the commerce clause of the Constitution. Judge Harlan, in giving the opinion of the court, said:

"If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from

¹ 155 U. S. 472, 39 L. ed. 223, 15 S. C. 154.

one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as said by this court in *Sherlock v. Alling*, 93 U. S. 99, 103: 'In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said generally that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in other pursuit.'

This opinion was concurred in by Justices Gray, Brown, Shiras, Jackson, and White. Chief Justice Fuller, with Justices Field and Brewer, dissented. In *Silz v. Hestenberg*,¹ this case has been approved by Justice Day delivering the unanimous opinion of the Court.

§ 264. In delivering the opinion of the Court in *Prigg v. Pennsylvania*,² Justice Story said:

"The police power belonging to the States in virtue of their general sovereignty, extends over all subjects within the territorial limits of the States; and has never been conceded to the United States."

Justice Gray, in delivering the dissenting opinion of the court in *Leisy v. Hardin*,³ in which Justices Harlan and Brewer concurred, said:

"Among the powers thus reserved to the several States is what is commonly called the police power—that inherent and necessary power, essential to the very existence of civil

¹ 211 U. S. 42, 53 L. ed. 74, 29 S. C. 10.

² 16 Peters, 625, 10 L. ed. 1060.

³ 135 U. S. 127, 34 L. ed. 123, 10 S. C. 681.

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society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime."

At page 128 he further says:

"This power, being essential to the maintenance of the authority of local government, and to the safety and welfare of the people, is inalienable. As was said by Chief Justice Waite, referring to earlier decisions to the same effect, 'no legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation and cannot divest itself of the power to provide for them.'"

Again he says, speaking of the case of *Brown v. Maryland*, 12 Wheat. 419, page 134:

"The statute there in question was evidently enacted to raise revenue from importers of foreign goods of every description, and not as an exercise of the police power of the State. And Chief Justice Marshall, in answering an argument of counsel, expressly admitted that the power to direct the removal of gunpowder or the removal or destruction of infectious or unsound articles which endanger the public health 'is a branch of the police power, which unquestionably remains, and ought to remain, with the States.'"

§ 265. The language of Chief Justice Marshall, in *Gibbons v. Ogden*,¹ must always form a part of the discussion of this question. In speaking of the inspection laws of the States, he says:

"They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power

¹ 9 Wheat. 1, 6 L. ed. 23.

over these subjects is granted to Congress; and, consequently, they remain subject to state legislation."

In *Holmes v. Jennison*,¹ Justice Baldwin uses this language:

"Every State has acknowledged power to pass and enforce quarantine, health and inspection laws to prevent the introduction of disease, pestilence or unwholesome provisions; such laws interfere with no power of Congress or treaty stipulations; they regulate internal police, and are subjects of domestic regulation within each State, over which no authority can be exercised by any power under the Constitution, save by requiring the consent of Congress to the imposition of duties on exports or imports, and their payment into the Treasury of the United States."

And on page 619 he says:

"Whenever internal police is the object, the power is excepted from every grant and reserved to the States."

§ 266. In the License Cases,² which involved laws of New Hampshire, Rhode Island, and Massachusetts, requiring a license to sell liquor, it was claimed that such law was an invasion of the commerce power of Congress. In the one case the liquor was from abroad, and in the other from a neighboring State. Justice Daniel,³ in these cases, said:

"A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State."

Justice Grier in these cases, uses this striking language:⁴

"It has been frequently decided by this Court, 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for

¹ 14 Pet. 616, 10 L. ed. 579.

² 5 Howard 504, 12 L. ed. 256.

³ *Id.*, 613.

⁴ *Id.*, 631.

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the preservation of the public peace, health and morals, must come within this category."

Justice Woodbury¹ said in the same case:

"Call them by whatever name, if they are necessary to the well-being and independence of all communities, they remain among the reserved rights of the States, no express grant of them to the general government having been either proper, or apparently embraced in the Constitution."

Justice McLean said²:

"A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power."

§ 267. In the *Passenger Cases*³ the question was whether laws of the States of New York and Massachusetts were unconstitutional in attempting to regulate foreign commerce and whether they conflicted with the treaty between the United States and England. The case was decided by a divided court of five to four. The five holding that the laws in question were void as attempts to regulate commerce. Taney, Daniel, Woodbury, and Nelson dissented. Justice Daniel, in his opinion, said:

"The law of New York has been further assailed in argument, as being an infraction of the fourteenth article of the treaty of amity and commerce negotiated between Great Britain and the United States . . . and the second clause of the sixth article of the Constitution having declared the Constitution and the laws of the United States, made in pursuance thereof, and treaties made under the authority of the United States, to be the supreme law of the land, the laws of New York, being in derogation of the fourteenth article of the treaty of 1794, are unconstitutional and void . . . Admitting this fourteenth article of the treaty to be in full force, and that it purported to take from the State of New York the right to tax

¹ 5 Howard 627, 12 L. ed. 627.

² *Id.*, 588, 12 L. ed. 256.

³ 7 Howard 506, 507, 12 L. ed. 702.

aliens coming and commorant within her territory, it would be certainly incompetent for such a purpose; because there is not, and never could have been, any right in any other agent than her own government to bind her by such a stipulation."

Chief Justice Taney uses this language:¹

"For if the people of the several States of this Union reserved to themselves (as he elsewhere holds they did) the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize nor enforce."

§ 268. Justice Brewer,² in *South Carolina v. United States*, delivering the opinion of the court, in clear and forceful language states the relationship of the Federal to the State governments and that of the State to the Federal government.

"We pass, therefore, to the vital question in the case, and it is one of far-reaching significance. We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, *and there are others in which the State is supreme, and in respect to them the National Government is powerless.*³ To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preëminently of this — a duty often times of great delicacy and difficulty.

"Two propositions in our constitutional jurisprudence are no longer debatable. One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself.

¹ 7 Howard 466, 12 L. ed. 466.

² 199 U. S. 447, 448, 50 L. ed. 261, 26 S. C. 110. ³ Author's italics.

"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in *Dred Scott v. Sandford*, 19 How. 393, 426:

"It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizens; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."

And again at page 451:

"Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it.

"This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

"In other words, the two governments, National and State, are each to exercise their power so as not to interfere with the

free and full exercise by the other of its powers. This proposition, so far as the Nation is concerned, was affirmed at an early day in the great case of *M'Culloch v. Maryland*, 4 Wheat. 316, in which it was held that the State had no power to pass a law imposing a tax upon the operations of a national bank. The case is familiar and needs not to be quoted from."

§ 269. Mr. Chief Justice Fuller, delivering the opinion of the Court in *In re Rahrer*,¹ uses the following language:

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive.

"And this court has uniformly recognized State legislation, legitimately for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government."

§ 270. The preservation of those essential powers which are necessary to the existence of a State, free from the domination or control of any extrinsic power, is well recognized in the case of *Collector v. Day*.² In this case, under a law of Congress, the salary of a Judge of the State Court of Massachusetts was subjected to a tax, and the Court held that such a law was unconstitutional and void. The grounds of this decision are well set forth in the opinion of the Court by Justice Nelson at page 125.

"Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfill-

¹ 140 U. S. 554, 35 L. ed. 572, 11 S. C. 65.

² 11 Wall. 125, 20 L. ed. 122.

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ing the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might."

And further at page 126 he says:

"We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the general government from levying the tax, as that depends upon the express power 'to lay and collect taxes,' but it shows that it is an original inherent power never parted with, and, *in respect to which, the supremacy of that government does not exist,*¹ and is of no importance in determining the question: and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government, stand upon as solid ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins v. The Commissioners of Erie*² from taxation by the State; for in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other."

¹ Author's italics.

² 16 Pet. 435, 10 L. ed. 1022.

§ 271. In *Boyd v. Alabama*,¹ Mr. Justice Field, in delivering the opinion, said:

"We are not prepared to admit that it is competent for one legislature, by any contract with an individual to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals. See *Moore v. The State*, 48 Miss. 147; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 663."

In *Thurlow v. The Commonwealth of Massachusetts*,² Mr. Justice McLean said:

"These laws do not in terms prohibit the sale of foreign spirits, but they require a license to sell any quantity less than twenty-eight gallons. Under the decision of *Brown v. Maryland*, it is admitted that the license acts cannot operate upon the right of the importer to sell. But, after the import shall have passed out of the hands of the importer, whether it remains in the original package or cask, or be broken up, it becomes mingled with other property in the State, and is subject to its laws. This is the predicament of the spirits in question.

"A license to sell an article, foreign or domestic, as a merchant or innkeeper or victualler, is a matter of police and of revenue, within the power of a State. It is strictly an internal regulation, and cannot come in conflict, saving the rights of the importer to sell, of any power possessed by Congress. It is said to reduce the amount of importation, by lessening the profits of the thing imported. The license is a charge upon the business or profession, and not a duty upon the things sold. The same price is charged to every retailer of merchandise, or spirits, at the same place, without regard to the amount sold. This charge is in advance of any sales. It would be difficult to show that such a regulation reduced the amount of imported goods. But, if this were the effect of the license, would that make the acts unconstitutional?

"The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious

¹ 94 U. S. 645, 650, 24 L. ed. 302.

² 5 Howard 504, 589, 12 L. ed. 256.

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disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulation of commerce; and yet no one doubts the local power. It is a power essential to self preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he is assailed by an assassin, or approached by poison. And it is the settled construction of every regulation of commerce, that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or anything which contaminates its morals or endangers its safety. Individuals in the enjoyment of their own rights must be careful not to injure the rights of others."

§ 272. In *N. Y. & N. E. R. R. Co. v. Bristol*,¹ Chief Justice Fuller, in delivering the opinion of the court, said:

"It is likewise thoroughly established in this court that the inhibition of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

The same doctrine has been laid down by Justice Harlan,² in the following language:

"There are certain fundamental principles which those cases recognize and which are not open to dispute. In our opinion, they sustain the power of the State to enact the statute in question. Briefly stated, those principles are: That the Government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words, or by necessary implication; that a power

¹ 151 U. S. 556, 567, 38 L. ed. 311, 14 S. C. 533.

² *House v. Mayes*, 219 U. S. 281, 55 L. ed. 213, 31 S. C. 234.

may be implied when necessary to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, *together with any treaties made under the authority of the United States*,¹ constitute the supreme law of the land, a State of the Union may exercise all such governmental authority as is consistent with its own constitution, and not in conflict with the Federal Constitution; that such a power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, *by reason of its never having been surrendered by the State to the General Government*; ¹ that among the powers of the State, not surrendered — which power therefore remains with the State — is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good; and that it is with the State to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States. The cases which sanction these principles are numerous, . . . and need not be here cited."

The case of the United States *v.* De Witt,² strongly affirms the doctrine which we are seeking to enforce in this chapter. An act of Congress rendered it a misdemeanor "to mix for sale naphtha and illuminating oils, or to sell petroleum inflammable at less than a prescribed temperature." This was purely a matter which affected the police of the State that Congress had no power to legislate upon and so the act was held void as an encroachment upon the police power of the State. Chief Justice Chase delivered the opinion of the court and said:

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from

¹ Author's italics.

² 9 Wallace 41, 10 L. ed. 593.

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the terms of the Constitution, and has been so fully explained and supported on former occasions,¹ that we think it unnecessary to enter again upon the discussion."

§ 273. Among the recent cases which show the strong tendency of the Supreme Court to recognize the inalienability of the police power of the State, may be mentioned that of *Compagnie Française &c. v. Board of Health*.² This case involved a conflict between the action of the Board of Health of the State of Louisiana operating under a law of that State, and the treaty between France and the United States, wherein France was accorded all the rights of the most favored nation.

The Board of Health had established certain quarantine regulations, looking to the protection of the health of the people against the scourge of disease from which they had recently suffered. A vessel, the "Britannia," was not permitted to enter certain quarantined sections of Louisiana. The treaty between the United States and France at the time provided that France should be treated on the footing of the most favored nation and the officers of the "Britannia" appealed to the provisions of a treaty between the United States and Greece, Article XV of which, on the subject of quarantine, was as follows:

"Article XV. It is agreed that vessels arriving directly from the United States of America at a port within the dominion of His Majesty the King of Greece, or from the Kingdom of Greece, at a port of the United States of America, and provided with a bill of health granted by an officer having competent power to that effect at the port whence such vessel shall have sailed, setting forth that no malignant or contagious diseases prevailed in that port, *shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessel shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes;*³ Provided always, that there shall be on board no person, who, during the voyage, shall have been attacked with

¹ License Cases, 5 Howard 504; Passenger Cases, 7 Id. 283; License Tax Cases, 5 Wallace 470; and the cases cited.

² 186 U. S. 380, 46 L. ed. 1209, 22 S. C. 811.

³ Author's italics.

any malignant or contagious disease; that such vessel shall not, during the passage, have communicated with any vessel liable itself to undergo quarantine; and that the country whence they came shall not at that time be so far infected or suspected that, before their arrival, an ordinance had been issued in consequence of which all vessels coming from that country should be considered as suspected, and consequently subject to quarantine."

The Board of Health, explaining the detention of the vessel, justified its act under the law of Louisiana, which authorized the State Board of Health in its discretion to "prohibit the introduction into any infected portion of the State persons acclimated, unacclimated, or said to be immune, when in its judgment the introduction of said persons would add to or increase the prevalence of the disease"; and at its meeting on September 29, 1898, the Board of Health adopted the following resolution:

"That hereafter, in the case of any town, city or parish of Louisiana being declared in quarantine, no body or bodies of people, immigrants, soldiers, or others, shall be allowed to enter said town, city or parish, so long as said quarantine shall exist, and that the president of the board shall enforce this resolution."

and instructed the quarantine officers to detain the vessel for the following reasons:

"Referring to the detention of the S. S. Britannia at the Mississippi River quarantine station, with 408 Italian immigrants on board, I have to inform you that under the provisions of the new State Board of Health law, section 8, of which I enclose a marked copy, this board has adopted a resolution forbidding the *landing of any body of people in any town, city or parish in quarantine.*"¹

These were the substantial facts in the case and the Court upheld the action of the quarantine officers in detaining the "Britannia." Justice White delivered the opinion of the Court

¹ Author's italics.

and Justices Brown and Harlan dissented. Justice White in rendering the opinion of the Court, said:¹

"Conceding, *arguendo*, this latter proposition, and therefore assuming that all the treaties relied on are applicable, we think it clearly results from their context that they were not intended to and did not deprive the government of the United States of those powers necessarily inhering in it and essential to the health and safety of its people. We say the United States, because if the treaties relied on have the effect claimed for them that effect would be equally as operative and conclusive against a quarantine established by the government of the United States as it would be against a State quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress. Without reviewing the text of all the treaties, we advert to the provisions of the one made with Greece, which is principally relied upon. The text of article XV of this Treaty is the provision to which our attention is directed, and it is reproduced in the margin.

"It is apparent that it provides only the particular form of document which shall be taken by a ship of the Kingdom of Greece and reciprocally by those of the United States for the purpose of establishing that infectious or contagious diseases did not exist at the point of departure. But it is plain from the face of the treaty that the provision as to the certificate was not intended to abrogate the quarantine power, since the concluding section of the article in question expressly subjects the vessel holding the certificate to quarantine detention if, on its arrival, a general quarantine had been established against all ships coming from the port whence the vessel holding the certificate had sailed. In other words, the treaty having provided the certificate and given it effect under ordinary conditions, proceeds to subject the vessel holding the certificate to quarantine, if, on its arrival, such restriction had been established in consequence of infection deemed to exist at the port of departure. Nothing in the text of the treaty, we think, gives even color to the suggestion that it was intended to deal with the exercise by the government of the United States of its power to legislate for the safety and health of its people or to render the exertion of such power nugatory by exempting the vessels of the Kingdom of Greece, when coming to the United States, from the operation of such laws. In other

¹ 186 U. S. 394, 395, 46 L. ed. 1209, 22 S. C. 811.

words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them. Especially where the restriction imposed upon the vessel is based, not upon the conditions existing at the port of departure, but upon the presence of an infectious or contagious malady at the port of arrival within the United States, which, in the nature of things, could not be covered by the certificate relating to the state of the public health at the port whence the ship had sailed."

§ 274. The conflict between the commercial clause and the police power of the State, and the proper relations of the one to the other, has been so well expressed in the following language that I will insert it in the discussion of the case:¹

"A vessel proposes to enter a harbor of a State under Congressional commercial regulations; and the State, to protect its people from disease, quarantines it. These two powers seem to conflict, but they do not, except as both operate upon the movement of the vessel, though from different sources of power. The vessel is subject to two powers which are entirely different, but not in conflict. It does not check a rightful object of commerce. It merely erects a bar against disease. Congress regulates the *rightful* object of commerce, under color of which it cannot authorize *wrongful* commerce. It cannot introduce disease, but may a rightful subject of commerce. The two powers are made to consist by restraining the State, under color of quarantine, from regulating rightful commerce, and restraining Congress, under color of commerce, from regulating the unlawful importation of disease."

§ 275. Justice White holds that the fifteenth Article of the treaty did not intend to abrogate the quarantine power in the State, because under certain conditions stated in said Article, should they arise, the right of quarantine was allowed. It would seem clear that the treaty did not attempt to abrogate *all* quarantine powers, for it stated conditions under which the right of quarantine was to be recognized, but it seems equally clear that the treaty intended to abrogate the quarantine power so far as the "Britannia" was concerned, because the "Bri-

¹ Tucker on the Constitution, Vol. II, 538.

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tannia" had conformed to every positive requirement of the treaty and none of the subsequent conditions which gave the right of quarantine applied to it.

Justice Brown in his dissenting opinion, in which Justice Harlan concurred, expressed his inability to see how a conflict between the treaty and the law of Louisiana could be avoided as follows:

"If the law in question in Louisiana, excluding French ships from all access to the port of New Orleans, be not a violation of the provisions of the treaty that vessels 'shall be subject to no other quarantine than such as may be necessary for the visit of a health officer of the port, after which such vessels shall be allowed immediately to enter and unload their cargoes,' I am unable to conceive of a state of facts which would constitute a violation of that provision. Necessary as efficient quarantine laws are, I know of no authority in the States to enact such as are in conflict with our treaties with foreign nations."

§ 276. The difficulty of reconciling Article XV of the treaty with the law of Louisiana without a conflict between the two is, however, removed by Justice White in the following passages from his opinion:

"Assuming that all the treaties relied on are applicable we think it clearly results from their context that they were not intended to and did not deprive the Government of the United States of their powers necessarily inhering in it, and essential to the health and safety of its people. We say the United States, because if the treaties relied on have the effect claimed for them, that effect would be equally as operative and conclusive against a quarantine established by the government of the United States as it would be against a State quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress."

and the following passage:

"Nothing in the text of the treaty, we think, gives even color to the suggestion that it was intended to deal with the exercise by the government of the United States of its power to legislate for the safety of its people or to render the exertion

of such power nugatory by exempting the vessels of the Kingdom of Greece, when coming to the United States, from the operation of such laws. *In other words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them.*"¹

In these two clauses are contained most important conclusions. In these passages it is clearly recognized that the annulment of the police power of the State in the preservation of the health and safety of the people of the State has not been attempted by the treaty under consideration, and the reason Justice White assigns for this opinion is the assumption, which he is clearly justified in making, that "the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them." The result of his decision seems to be no less conclusive and no less effective because he declares that the police laws must have been recognized as binding and effective when the treaty was made, and that therefore the treaty must be construed as not interfering with them, but as having been made subject to the right of enactment of such laws. This opinion is sanctioned by an eminent authority:²

"The police power may be justly said to be more general and pervading than any other. It embraces all the operations of society and government; *all the constitutional provisions presuppose its existence, and none of them preclude its legitimate exercise. It is impliedly reserved in every public grant.*¹ Chartered rights and privileges are therefore like other property, held in subordination to the authority of the government, which may be so exercised as to preclude the use or doing of the very thing which the company was constituted or authorized to manufacture or perform. The legislature cannot be presumed to have intended to tie its hands in this regard in the absence of express words; but if such a purpose were declared, it would fail, as an attempt to part with an attribute of sovereignty which is essential to the welfare of the community."²

¹ Author's italics.

² Haro, "American Constitutional Law," Vol. II, 766.

³ Mr. Haro cites the following cases as sustaining the above views:

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§ 277. The opinion of Justice White does hold that the quarantine power of the States was not intended to be abrogated by the treaty, but with equal power the opinion holds that this was an inherent and necessary power in the States and that therefore the treaty was made "subject to the enactment of such health laws," etc. Indeed, when Justice White thus recognizes that a treaty must be made *under the Constitution* to be valid, his opinion receives powerful sanction in the words of the Apostle Paul: "For he hath put all things under his feet. But when he saith, All things are put under him, it is manifest that he is excepted, which did put all things under him."¹

This case illustrates most strikingly the importance of the doctrine of the inalienability of the police power of the State. If allowed by the treaty to enter, the "Britannia" could have entered the quarantined ports of Louisiana and would have furnished the additional fuel of four hundred Italian immigrants to the consuming flames of the pestilence that was sweeping the State. If a municipality can order the destruction of a building in order to prevent the spread of flames, under its police power, it is inconceivable why the same right should not reside in the State to prevent the spread of disease and pestilence.

This case will therefore be placed in our judicial history alongside of those already quoted, which maintain that the police power of the State is inalienable, and that being inalienable, treaties must be made in recognition of their validity, and must be so construed.

The Butcher's Union Co. v. Crescent City Co., 111 U. S. 746, 751, 28 L. ed. 585, 4 S. C. 652.

The License Cases, 5 How. 583, 12 L. ed. 256.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

The Commonwealth v. Alger, 7 Cushing 53, 84.

The Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.

Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989.

Galena R. R. v. Appleby, 28 Ill. 283.

Ohio R. R. Co. v. McClelland, 25 Ill. 140.

Dingman v. The State, 51 Ill. 277.

¹ I Corinthians xv, 27.

§ 278. The consideration of the above cases leads to this conclusion: If Justice Harlan was stating the law when he said:¹ "The police power is not granted by or derived from the Federal Constitution, but exists independently of it, by reason of its never having been surrendered by the State to the general government"; If Judge Cooley was stating the law when he said,² referring to the police power, "It cannot be taken from them (the States) either wholly or in part and exercised under legislation of Congress. Neither can the National Government, through any of its departments or officers, assume any supervision of the police regulations of the States"; If Judge Gray was stating the law when, in *Leisy v. Hardin*, *supra*, he declared this power was "inalienable" in the States; If Judge Bradley, with the approval of the whole court, was stating the law when, in *Beer Co. v. Massachusetts*, *supra*, he said, "They (the police powers) belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself"; If Chief Justice Redfield was stating the law when in *Thorpe v. Rutland & Burlington Railway Company*, *supra*, he said, "We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is by the Fifth Article of the Bill of Rights of this State, expressly declared to reside perpetually and inalienably in the legislature; which is perhaps no more than the enunciation of a general principle applicable to all free States, and which cannot therefore be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation"; If Chief Justice Waite was stating the law when he said, in *Stone v. Mississippi*, *supra*, with the approval of the whole court, "No

¹ *House v. Mayes*, 219 U. S. 281, 55 L. ed. 213, 31 S. C. 234.

² Cooley, "Constitutional Limitations," 831.

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government dependent on taxation can bargain away its whole power of taxation, for that would be substantially abdication"; If Judge Swayne, in the case of *The Northwestern Fertilizing Company v. Hyde Park*,¹ was stating the law when, speaking of the power of a village to pass an ordinance prohibiting the carrying of offal through the village, though a charter had been granted to a fertilizing corporation to manufacture dead animals into agricultural fertilizer, he said, "We cannot doubt that the police power of the States was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases"; If Judge Story, in *Prigg v. Pennsylvania*, *supra*, stated the law when he said, "The police power belonging to the States . . . has never been conceded to the United States"; If Justice Nelson was stating the law when he said in *Collector v. Day*, "In respect to the reserved powers, the State is as sovereign and independent as the general government"; If Chief Justice Fuller stated the law when, in *New York & New England Rwy. Co. v. Bristol*, he said, "The governmental power of self protection cannot be contracted away"; If Justice Harlan was right when he said in *Patterson v. Kentucky*,² "State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily entrench upon any authority which has been confided, expressly or by implication, to the national government"; if these judges have stated the law in these cases, they have laid down a rule and established a principle that should settle this question for all future time; for if the States with their sovereign powers are thus circumscribed as to *their own powers*, so that they cannot be given up or surrendered because they are trust powers committed to them for the benefit of the people, by what stretch of constitutional construction can the Federal Government be supposed to have acquired them for any purpose?

¹ 97 U. S. 659, 24 L. ed. 1036.² *Id.* 504, 24 L. ed. 1115.

The States, their original proprietors and owners, can't relinquish them by barter, sale, or gift to any person for any purpose, for to do so would be "abdication," as Chief Justice Waite says; and yet it is urged by some that though the States cannot relinquish such powers for any purpose, when the Federal Constitution was adopted, they granted a general and exclusive power to the Federal government to make treaties, and included these police powers in such grant; and this too, in the face of these decisions holding that these powers of the States cannot be surrendered or abandoned by them in any way. If, from the nature of the States, these powers cannot be alienated or surrendered, because the lack of them would be a surrender of Statehood, it is clear they never granted them to the Federal government, because they could not do so; and if the surrender or grant of these necessary powers by the States be "abdication," the assumption of them or the taking of them by the Federal Government *from the States* would be spoliation.

§ 279. It will not suffice as against this view to suggest that the States agreed in making the Constitution that the treaty power was to be the supreme law of the land, and therefore supreme over all State laws. If the police power be *inalienable*, the States never granted such supremacy in the broad sense in which it is claimed. Nor is such construction limiting the treaty-making power more strained than that heretofore referred to where the Supreme Court holds that the Constitutional provision, Article I, § 10, clause 1, "No State shall . . . pass any law impairing the obligation of contracts," does not apply to a State when, in order to protect the health and morals of the people, charters may be modified or contracts changed under the resistless force of this police power. Nor is it more strained than when, under the commerce clause railroads undertake to run interstate trains on Sunday, the police power of the State is recognized as strong enough to prevent it,¹ nor when, under the same Federal power, the limitation of the carriage of gunpowder and explosives is admitted to be controlled by the

¹ *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 S. C. 1086.

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police power of a State,¹ even when applied to interstate commerce.

§ 280. If the treaty power may absorb the police powers which belong to the States, then the States, upon which the Union is dependent for its existence, may be shorn of their powers and of their existence, as States. The States have many police powers, undoubtedly, whose exercise is not absolutely essential to the existence of the State, though eminently appropriate to be exercised by the State. May not the solution of the conflict be found just here; that where a seemingly exclusive and paramount power in the Federal Government needs a local power of the State which may be necessary to the complete and symmetrical development of such Federal Power, if such State power be not an essential but only an appropriate power in the autonomy of the State, the States by amendment to the Constitution might grant such powers to the Federal Government for such purposes. Thus the supremacy of a Federal power on a subject committed to its exclusive keeping would be recognized, while the State would be deprived of no essential attribute. But where a power of a State, included either in its reserved powers or its police power, is one without which no State can exist, which is essential and necessary to the protection of the health, the safety, or the morals of the people, such power cannot be surrendered by the State or absorbed by the Federal Government, because to do so would be to annihilate the State. The States may be said to represent the piles upon which the Federal structure has been erected, and this superstructure cannot be added to, enlarged, or strengthened by withdrawing one of them from the foundation to be worked into the superstructure without endangering the whole Federal building. The taking of one for such purpose would be dangerous to the superstructure; the taking of all, its total destruction.

§ 281. If therefore, we find any power which is essential to

¹ *Licensor Cases*, 5 How. 589, 12 L. ed. 256; *Davenport v. Richmond*, 81 Va. 636; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678.

the State, such as we find in *Collector v. Day*,¹ the power to establish a judiciary to determine the rights and privileges of the people of a State, such power cannot be controlled or curtailed by any Federal power, however exclusive or paramount; nor can it be alienated by the State itself, because such alienation would be an act of suicide. But if, on the other hand, some power is sought to be utilized by the Federal Government which belongs to the State in its ordinary exercise and which is necessary for the completeness of some Federal power, but is not essential to the autonomy of the State, though its use by the State is usual and appropriate, such power might be granted to the Federal Government by an Amendment, because by so doing the States would be aiding a legitimate grant of the Federal Constitution over the general subject, and not endangering their own existence upon which the Federal Government rests. But if the State power sought for use, by an exclusive or paramount Federal power, be an essential power of the State, such Federal power will be thus perfected at the expense of the life of the State. That these interdependent bodies-politic — the States and the United States — should possess the power of destroying the other was never contemplated, and has been distinctly denied by the Supreme Court in the cases of *Collector v. Day*, *supra*, and *Dobbins v. Commissioners*.²

§ 282. The coefficient clause of the Constitution³ follows the seventeen enumerations of powers of Congress in Article I, § 8, and declares that Congress may "make all laws which shall be necessary and proper for carrying into execution the foregoing powers," but it adds, "and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." The treaty-making power is one of these. So that to carry out the treaty-making power,

¹ 11 Wall. 113, 20 L. ed. 122.

² 16 Pet. 435, 10 L. ed. 1022. See also *Texas v. White*, and *Lane County v. Oregon*, *supra*.

³ Art. I, § 8, cl. 18.

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Congress may pass laws which shall be necessary and proper to carry into execution the treaty-making power. What laws may be passed then to carry this power into effect? They must be "necessary and proper." Chief Justice Marshall, in *McCulloch v. Maryland*,¹ says:

"Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional."

"Necessary" does not mean absolutely indispensable, yet "it must be found to be one among many possible means which might be suggested for use, each and all of which are indispensable as means to the end of the execution of an expressly granted power."² The law must also be "proper." Judge Story,³ speaking of the interpretation of this word, says:

"It has a sense, at once admonitory and directory. It requires that the means should be *bona fide*, appropriate to the end."

Judge Story's definition of the word "proper" has been adopted by the courts in many cases; so that when Congress, under the coefficient clause undertakes by law to breathe life into the grants of power included in Article I, § 8, such laws must not only be necessary as one of the appropriate means for attaining the end in view, but they must be "*bona fide*, appropriate" to the end. Tested by this definition, and by these constructions, can any law of Congress or any treaty be "*bona fide* appropriate" that seeks to destroy the relations of the States to the Union, or the Union to the States, or that may destroy the foundations upon which the Union rests in the annihilation of the States, for it must be remembered that when the States are stripped of their powers they will cease to be States?

¹ 4 Wheat. 421, 4 L. ed. 570.

² Tucker on the Constitution, Vol. I, 370.

³ Story on Constitution, § 1253.

§ 282a. The cases above cited show that many of the justices of the Supreme Court, as well as commentators upon the Constitution, have expressed the opinion that the right of a State at all times, on the principle of self-preservation, to maintain its police power, was recognized as a settled principle of our constitutional law. The doctrine seems to be founded in reason and is sustained by the authority of the Supreme Court; and while the cases from the Supreme Court above quoted have sustained this doctrine, it must be admitted as equally true that the same Court has decided in numerous cases that the police power of the State may be enforced in the enactment of local laws pertaining to the health and safety of the people, having no intent to regulate commerce among the States, though they may incidentally affect it, and that such laws are valid *until* superseded by an act of Congress; but if Congress acts, all State laws that conflict with the constitutional laws of Congress on the subject must yield.

§ 283. This line of decisions would seem to conflict with the cases we have quoted; for if the police power of the States cannot be alienated, as held by the Courts, *supra*, the right of the States to pass local laws under their police powers which only incidentally affect interstate commerce, must be admitted; for if inalienable, the States have never parted with this power. In other words, the first line of cases holds that the police power of the States cannot be alienated; the second holds, in effect, that this power has been granted to Congress in the general grant of power to regulate commerce. If the first line of cases propounds the law correctly, then, of course, Congress has no power to interfere, even in carrying out the commerce clause, with the local laws of the States, which do not affect commerce, except incidentally.

§ 284. How is this conflict to be reconciled? It is not our purpose in these pages to attempt a task so difficult, for it is not necessary to the solution of the question under discussion; and moreover, the Court that made it will reconcile it. If the latter group of cases holding that the police power of the

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States is subordinate to the power of Congress over commerce state the law correctly, it can only be on the theory that when the States granted to Congress the power to regulate commerce among the States they granted *everything* to Congress necessary to carry out completely such grant of power, and this view is enforced by the fact that interstate commerce, it is claimed, cannot be successfully maintained if every State through which it is carried on may hamper it by local laws. This view has received additional sanction in the general rule adopted in the construction of grants; for it is well settled that if there be no other provision in the same instrument whose validity might be involved, or other limitation, ordinarily a grant of power carries with it all that is necessary to its completeness. If, then, the commerce power includes the police powers of the State in its scope, another question is pertinent and must be met: If the States granted to Congress the power over commerce and this grant carried with it all of the police powers of the States (because the use of these local powers and rights was necessary to the complete development of the commerce power) does not the same line of reasoning justify the conclusion that when the States, in the Constitution, granted to the treaty-making power an exclusive, supreme power like the commerce power, that such grant carried with it also the police powers of the State in order to its complete and full development? This would seem to be a natural conclusion, but the two grants stand upon very different footings, and even if the grant of power to Congress to regulate commerce carried with it the police power of the States, it by no means follows that the same rule applies to the grant of the treaty power.

§ 285. When the Constitution was framed the States, in order to form the government of the United States, gave up of their powers certain ones to the Federal Executive, to the Judiciary, and to Congress, and did not grant back to themselves — but *reserved* to themselves all other powers. The States were the grantors, the Federal Government the grantee. Among the powers granted to Congress by the States is that of regulat-

ing commerce among the States. It is a *specific* grant, complete in itself, but limited to commerce and its incidents. In the same instrument which contains this grant is the Tenth Amendment, which does not undertake to enumerate the powers left with the States, but reserves all not given. Every local right and every local power which the State possesses not granted to the Federal Government is specifically reserved; so this instrument contains provisions of a *specific* grant to Congress of the commerce power and the *specific* reservation to the States of every other State power not granted, which is equivalent to a *specific grant* of power. If we consider the Constitution as framed on the Hamiltonian theory, and not on the Jeffersonian, then the people of the whole United States as one body-politic were the grantors of all powers contained in the Constitution. The result under this supposition would be the *specific grant* to Congress of the commerce power, and the *specific grant* in the Tenth Amendment to the States of each and every power not granted to the Federal Government. The conflict between these two would require the construction of two *specific grants* of power in the same instrument, affecting, it may be, the same subject. The conflict would be between the two *specific grants* of power, or, more accurately speaking, a *specific grant* of power and the reservation of a *specific power* in the same instrument which is equivalent to the grant of power. Such a conflict is quite different from that which arises in the grant to the treaty power, and its decision rests upon different principles, for in the case of the treaty power, not a *specific* but a *general* grant of power is given. In this grant there is no verbal limitation such as applies to the commerce grant, for the grant of the commerce power is confined within the narrow limits of the word "commerce" and its incidents, no more and no less. As to the treaty power, no "pent up Utica confines its bounds"; its scope is as "boundless and limitless as the sea," it is claimed. It may embrace any and all subjects — commerce among them. So that in this case the Constitution contains a *general* grant of power to the President and Senate to make treaties, and a

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specific reservation of each reserved or police power to the States, and the conflict between the two is a conflict between a *general* grant and a *specific* reservation of power (which is equivalent to a *specific* grant in the same instrument). It is seen at once that the rule of construction in the two cases is very different and in the latter case the *general* grant of power to the President and Senate to make treaties is limited by the *specific* reservation of powers to the States which is equivalent to a *specific* grant. For in all instruments where there is a conflict between *general* and *specific* grants, the former is limited by the latter. If by deed I grant *all* my landed estate known as High Acre, and in the same instrument reserve the woodland on it, the *specific* reservation limits the *general* grant, and High Acre goes to the grantee without the woodland. The same would be true under a will.

§ 286. The States may have been willing to relinquish all powers over commerce and give to the Federal Government *all* of their local powers necessary to make complete the commerce power, for the proper regulation of commerce among the States was the express object of the Annapolis Convention, which was the forerunner of the Federal Convention. They may have been willing to do the same as to every other granted power to Congress, but these were few in number and were only such as had relation to the people of all the States. All other State powers remained with the States: but when it is claimed that all of the powers remaining in the States after the grants to Congress, are embraced in the power to make treaties, it may well be asked what powers are left to the States, since this power is exclusive and unlimited by any words in the grant, and because the word "treaty" in its broad significance may include every and any subject that may be the subject of agreement. If this line of reasoning be correct, we find the States gave up all of their local powers that might interfere with the complete development of the exclusive grants of power to Congress, and then with unexampled prodigality gave up all remaining powers to the treaty-making power. If this be the

correct interpretation of these various grants, it is interesting to inquire what could have occasioned the intense and universal feeling throughout the country for the adoption of the Tenth Amendment? For, if the States, under this supposition, gave up to Congress in the specific grants to it, all of their local powers that interfered with the complete development of the exclusive Federal powers, and then with lavish hand bestowed all remaining powers upon the treaty power, what rights of the States were left to be reserved to them? Had they not given up all?

§ 287. So we conclude that though we may admit that the decisions of the Supreme Court, *supra*, that hold that the police power of the States is inalienable have been rendered doubtful as authority by later or other decisions of the Court, and that the grant to Congress to regulate commerce carries with it the right to appropriate all reserved and police powers of the State, still, as we have seen, this does not justify the conclusion that the same rule of construction applies to the treaty power. But there is another cogent reason why the same rules of construction should not and do not apply to the commerce power and the treaty power. The one deals with internal affairs, interstate commerce; the other with external affairs. The one deals only with Americans, while the other seeks to fix the relations between Americans and foreigners. The one by the absorption of the police powers of the State or the reserved powers of the State, can give no greater right to any one American citizen than to another; the other by the absorption of the reserved rights or police powers of the State may give to the *foreigner* greater rights in America than the *American* citizen possesses. The one by the absorption of the police power and all the reserved powers of the State cannot put one American over another; the other, by the absorption of the same powers might make the foreigner superior in rights and dignity to the native American.

§ 288. On the supposition discussed above the commerce power knows no limitations, except those contained in the Constitution itself, while the treaty power has always been regarded

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until recently as subject to limitations, by the judges who have discussed it. It would seem useless to attempt to give the views of the judges running through all of the reports as to the extent of the commerce power. Chief Justice Marshall, in the case of *Gibbons v. Ogden*,¹ has described it in a way that leaves no doubt of his position:

"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."²

Contrast this definition of the commerce power with that of the treaty power given by Judge Field, in the case of *Geofroy v. Riggs*,³ where he says:

"The treaty power as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itself and of the States.⁴ It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the States⁴ or a cession of any portion of the territory of the latter without its consent."

§ 289. Chief Justice Marshall declares the commerce power in Congress to be complete, that it is plenary, and while he admits that the Constitution limits its application in certain direc-

¹ 9 Wheat. 1, 6 L. ed. 23.

² This construction of the power of the commerce clause is not given because we think the Court has adopted it in subsequent cases to the full extent expressed by the Chief Justice, but because this case is one of the initial cases on the subject of commerce, and illustrates the marvelous power of the great Chief Justice.

³ 133 U. S. 266, 33 L. ed. 642, 10 S. C. 257.

⁴ Author's italics.

tions, yet where it does apply it knows no limitation. How different from the definition of Judge Field as to the treaty power when he declares that though unlimited in terms, it is restrained by the nature of the States, and that it can do nothing that would operate as a change in the character of one of the States. Judge Field's opinion in this case is constantly quoted by those who claim that the treaty power in its unlimited scope may override not only the powers of the States, but the powers committed to the Federal Government; yet this opinion which is quoted improperly by most writers as deciding the question of the supremacy of a treaty over a State law,¹ declares as a fundamental principle that the States are to be considered in the making of treaties, and that their characters cannot be changed. This being true, how can a treaty take from the State those powers which are essential and necessary to Statehood, or those police powers which are equally necessary for the protection of the people of the State, without changing its character? No stronger view can be found than that in Judge Field's opinion, for the protection of the States. By his words it is not left to inference or to general interpretation, but the States are mentioned by name to insure their security against the aggressions of the treaty power. If the commerce power be as extensive as Chief Justice Marshall has declared it to be, and if it be true that the Court in other decisions has subordinated the reserved rights and police powers of the States to the commerce power, still the judges, when they come to consider the treaty power, hold that the same rule does not apply to it, for the States must be considered in the exercise of this great power, and nothing admitted as a proper subject of treaty regulation that would change the character of the States.

Justice Swayne, in *Hauenstein v. Lynham*,² speaking of the treaty power, said:

"There are doubtless limitations of this power, as there are of all others arising under such instruments, but this is not the proper occasion to consider the subject."

¹ See Chapter VI.

² 100 U. S. 483, 25 L. ed. 628.

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Judge Field's view as expressed above in his opinion in *Geofroy v. Riggs* has received the sanction of many Federal and State judges and commentators upon the Constitution, and reference is here made to Chapter I and Chapter II where the views of statesmen and judges on this subject are found which accord fully with Justice Field's opinion.

§ 290. Another view, which has been treated elsewhere in these pages, may be referred to briefly. If the treaty power may take from the States one of their reserved rights, it may take all. If it may appropriate the police power of the States in one respect, it may appropriate it altogether. To do so would lead to the destruction of the States which constitute prime elements in the Federal Government itself. Chief Justice Marshall, in *Gibbons v. Ogden*, says:

"Although many of the powers formerly reserved by the States are transferred to the Government of the Union, yet the State governments remain and *constitute a most important part of our system.*"¹

Can the States then be destroyed without destroying the whole system? And can they be stripped of their powers without their destruction?

And so, we may add that a construction that gives to one power in an instrument the power of destroying the whole instrument is not to be favored, for every instrument should be construed *ut res magis valeat, quam pereat.*²

¹ Author's italics.

² Judge Cooley has laid down a wholesome rule of construction as follows:

"The rule applicable here is that *effect is to be given if possible to the whole instrument,** and to every section and clause. If certain portions seem to conflict the court must harmonize them if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. This rule is applicable with special force to written constitutions. . . . One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat

* Author's italics.

§ 201. Again, the effect of the claim that Congress in regulating interstate commerce and the treaty power in making treaties may take the reserved rights of the States, as well as their police powers, is seen by the following considerations to lead to very different results. The enumerated powers delegated to Congress are but few in number, and are powers given to Congress because they affect all of the States, and are powers in which all the States have a common interest. The power to regulate commerce, to coin money, to establish post-offices and post-roads, the power of taxation, etc., would give to Congress, under the supposition of controlling the reserved rights of the States, the power to do anything in reference to these subjects which are expressly granted, or anything that could be implied from such grants, and also all that could be done by any legislative power, national or State, with reference to these subjects, whether they pertained to the common interest of all, or affected the local interests of the people of one State alone; but each one of these grants of power in its legislative development, would still be necessarily confined to the specific subject of the grant. This would be a limited sphere, but on our supposition, a paramount and exclusive one; embracing all legislation that could affect the subject, either national or local.

§ 202. Now, if we apply this principle to the treaty-making power, we find there is no such restriction as in the case of the enumerated powers of Congress. The power to regulate commerce, to coin money, the power to tax, the power to naturalize foreigners, have all restricted and circumscribed limits. Under commerce nothing but matters relating to commerce could be considered, etc. The power to make treaties has no such limitation. It is, in effect the power to make agreements — contracts — and an agreement or a contract may be made upon any subject in the entire catalogue of human desires and human wants. It may embrace not only matters which pertain to a another, if by any reasonable construction the two can be made to stand together.†

† "Constitutional Limitations," Seventh Edition, pp. 91,92.

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Nation in its international relations alone, but it may come down to the very fireside of the citizen, in the private walks of his everyday life and from these sources gather the subjects of mediation and agreement with foreign countries. No subject would be excluded, no right of property or of person secured by municipal, county, magisterial, State, or National power, would be exempt from its voracious grasp.

§ 293. The grants of power to Congress embrace single subjects of a national character. The treaty power in the above suggestion would embrace all subjects, national and local. The powers of Congress are limited to specific subjects, those of the treaty power would embrace all subjects. The powers of Congress are national in extent and scope, those of the treaty power would embrace local as well as national rights. No right of person or property under this suggestion could escape the meshes of its net. The beasts of the field and the fishes of the streams that water the meadows of the plantation as well as the birds of the air,¹ would come under its controlling force. The highways of the country, and the schools of the neighborhood would be surrendered to its control. Property rights and personal rights that pertain to the citizen in the magisterial district, in the county, in the State, in the municipality, and in the country would be subjects of barter and trade in the world's international market, while rights secured by the law of the State or by the laws of Congress, or by the Constitution itself, would be subjects of international exchange or diplomatic concessions. Under this construction every local right would be surrendered, every federal right might be, for be it remembered that if this power can include all rights secured in the Tenth Amendment, by parity of reasoning it would include in its grant the powers conferred on the Federal Government also. The latter would not be more secure than the former from its aggressions, for

¹ It is understood that a treaty is now proposed, if not in process of negotiation between the United States and Canada, to regulate migratory birds in conformity with the Weeks-McLean Migratory Bird Law.

does not the supremacy accorded the Constitution in the Sixth Article pervade the whole instrument and every section of it, and is not the Tenth Amendment as much a part of it as the section that grants the enumerated powers to Congress? The result of such a conclusion would be the concession to the treaty-making power of the power to destroy the Constitution, to which it owed its existence. The concession to Congress to take the reserved rights of the States to perfect its grants of power might cripple the States, but the same concession to the treaty power would destroy them.

If the States be destroyed, Judge Story very forcibly tells us the result:¹

"In the next place, the State governments are, by the very theory of the Constitution, *essential constituent* parts of the general government. They can exist without the latter, but *the latter cannot exist without them.*"²

Another distinguished New England writer recounts with fervid eloquence the dire results to be expected from a disregard of the proper limitations of the Federal Constitution in the following language:

"Our federal government has indeed shown a strong tendency to encroach upon the province of the State governments, especially since the Civil War. Too much centralization is our danger to-day, as the weakness of the federal tie was our danger a century ago If the day should ever arrive (which God forbid) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington and when the self-government of the States shall have been so far lost as that of the departments of France, or even so far as that of the counties of England, — on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever."³

§ 294. If James Wilson of Pennsylvania had succeeded in incorporating into the Constitution a resolution he advocated

¹ Story on the Constitution, § 511, p. 383.

² Author's italics.

³ Fiske, "Critical Period of American History," 237.

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there would certainly be ground for the claim that both Congress and the treaty power have no limits to their powers.

"With respect to the province and object of the general government they (the States) shall be considered as having no existence."

But this doctrine has been discarded so often by the Supreme Court, from Chief Justice Marshall to Justice Brewer, that further refutation of it need not be attempted.

§ 295. Those who maintain the unlimited supremacy of the treaty-making power by annihilation of the States, would seem to paraphrase Article VI of the Constitution so as to have it read: "*The Federal Government* and the laws of Congress made in pursuance of it, and all treaties made, or which shall be made under the authority of the Federal Government, shall be the supreme law of the land." They proceed as if the Constitution embraced only Federal powers. They seem blinded to the fact that the States and State powers are as distinct and necessary factors in the Government of the United States as Federal powers. The first step in every argument on this subject they base upon the fact of the supremacy of the treaty under Article VI of the Constitution, but signally fail to recognize the fact that this same Article makes *the Constitution*, which embraces the powers of Congress, the treaty-making power, and every other power under it, *supreme*; and when the Constitution is made supreme, it follows that every right and power under it is made as supreme as every other power and right, and if all are supreme, then no one power is supreme over another. Supremacy is infused into every right and power under it and these rights and powers are not only Federal, but State; and by this Article of the Constitution the reserved powers in the Tenth Amendment are made as supreme in the governmental structure under the Constitution as the treaty power or the laws of Congress, for the same pervasive supremacy which makes the one supreme operates upon the other in the same manner, even though the reserved rights of the States were not already

supreme powers within their spheres, having never been surrendered to the Federal Government.

§ 296. If the establishment of an "unlimited" treaty power is to be the ultimate conclusion on this great question, it must be admitted that the incorporation of the treaty-making power into the Constitution of the United States was the introduction into our governmental citadel of a Trojan horse, whose armored soldiery, for years concealed within it, now step forth armed *cap-à-pie*, shameless in their act of deception, eager and ready to capture the citadel upon which they pretended to bestow their gift. If such construction be possible it would be of interest to know for what purpose the Tenth Amendment was ever demanded and incorporated into the Constitution.

§ 297. A summary of the argument attempted and the views expressed in this chapter, may serve to elucidate the subject in the mind of the reader:

(a) A careful consideration of the relation of the States to the Federal Government, and the purposes and objects for which the Government was formed, together with an examination of the provisions of the Constitution itself, lead strongly to the conclusion that no essential power of a State, whether a reserved power or a police power, can by reasonable construction be constitutionally taken from it, in furtherance of the treaty-making power.

(b) A number of cases have been collected and cited, *supra*, in which the Supreme Court holds that the police power of the States is inalienable, and cannot be surrendered; and in some of them it is held that even the provision of the Constitution itself that no State shall pass any law impairing the obligation of contracts cannot prevent the States from exercising its police powers in the interests of the safety and morals of the people.

(c) Another line of decisions by the same Court has been referred to, beginning with *Gibbons v. Ogden*, *supra*, and ending with the *Employer's Liability Cases*,¹ which hold that under the police power of the States, laws may be enacted by the States

¹ 223 U. S. 1, 56 L. ed. 327, 32 S. C. 169.

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which, though they may incidentally operate upon interstate commerce, are valid, but only valid *until* Congress chooses to legislate on the same subject: Thereby placing the police power under the control of the commerce power.

(d) We have sought to show that if the line of decisions referred to under "c" are to be accepted as the final opinion of the Court on this subject, in the face of the decisions under "b," it does not follow that the police power of the States can be, or has been, absorbed by or merged into the treaty power for the following reasons:

1. Because it is an accepted rule of construction of instruments containing grants that a *general* grant will be modified and limited by a *specific* grant. For example, the grant to the President and Senate to make treaties is a *general* grant; the right to control the tenure and devolution of real property in the States is a reservation of power, of a *specific* power; or, if the Hamiltonian theory of the formation of the Government be accepted, wherein the people of the United States, as one body politic, were recognized as the grantors of all powers in the Constitution, under this theory we find a *general* grant to make treaties to the President and Senate, and a *specific* grant to the States to control the tenure of real property, etc. And a treaty could not undertake such control, under a *general* grant of power, because it would be manifestly limited by the *specific* grant to the States.

2. Because the extent and character of the two powers are different, and therefore a rule that may be applied in the construction of the one may not apply to the other; the commerce power is said by Chief Justice Marshall to be unlimited in scope and extent, except where the Constitution puts restraint upon it. Judge Field in *Geofroy v. Riggs*, *supra*, declares in so many words that the treaty power is limited *by the character of the States*, and that no treaty can change the character of the States; so that no treaty can be made that fails to recognize the relations of the States to the Federal Government, and their powers and position in that Government.

3. The effect of the right of the commerce power and of the treaty power to absorb the police power of the States, if allowed, would shew very different results. The commerce power is limited to commerce and its incidents, and if it be admitted that the commerce power may take the police power of the States when needed, the number of times would be few. But, if the treaty power were permitted to take the police powers of the States *ad libitum*, they would be unlimited in number, for the treaty power may embrace any and all subjects. Such a concession to the commerce power might take some of the powers and weaken the States, but such a right in the treaty power would allow it to take all their powers and destroy them, and no construction of the Constitution can be admitted that would concede the power in any one department of it to destroy any part or the whole of it.

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CHAPTER XIII

CONCLUSIONS. LIMITATIONS ON THE TREATY-MAKING POWER.
IF GREATER POWER IS REQUIRED THE REMEDY IS BY
CONSTITUTIONAL AMENDMENT

§ 366. The investigations made in the previous chapters of this book, the consideration of the Constitution as a whole, together with the decisions of the Supreme Court, and the opinions of jurists and statesmen on the different phases of this subject, lead to the conclusion that the following are proper and constitutional limitations upon the treaty-making power under the Constitution of the United States.

I. That a treaty cannot take away or impair the fundamental rights and liberties of the people secured to them in the Constitution itself, or in any Amendment thereof.

No question was more seriously considered at the time of the making of the Constitution than that which affected the civil and religious liberties inherited by our ancestors from the mother country. These were regarded as safe in the keeping of the States. The advocates of a strong centralized government endowed with energies unknown to the government under the Articles of Confederation, were met in debate upon the hustings and in the forum by the advocates of State sovereignty, who feared the loss of personal liberty in the adoption of the new government. The former looked to the development of the country through the strength of the government; the latter to the development of the individual who was to make the government. The one believed that the country could best be developed by a strong government, in which each individual

would share its benefits. The other believed that in proportion to the strength of the individual would be the strength of the government composed of such individuals. Both ideas were patriotic, and both contained much of sound reasoning. Our recent separation from Great Britain, however, with its monarchical form of government created a natural fear among the people of the establishment of a monarchy in America. The spirit of liberty was already aroused in America, and in France the rumblings of the approaching revolution could be heard and its influence was permeating the old and the new world in its powerful appeals for greater liberty of the masses. Throughout America, in every Colony, the struggle for the adoption of a new constitution, confessedly for the purpose of strengthening the government, caused an uneasiness among the people of the several States lest the new government with its new strength might curtail the liberties which they had fought to secure from Great Britain, and for which the whole country at that time was eagerly seeking security. Patrick Henry demanded a Bill of Rights for the Constitution before it should be adopted, that the rights of the people might be secured. Mr. Jefferson, though in France, was familiarizing the people of America with the conditions that were stirring the French nation to the first steps of revolution. And so, when the Constitutional Convention had finally adopted the Constitution without a Bill of Rights, its ratification by the different States became a question of great doubt. The struggle was long and doubtful, but when, under the influence of the Father of his Country, Virginia, by a close vote, ratified the instrument, the victory was won. In their ratification many of the States recommended Amendments to be adopted as a condition of their ratification.

§ 367. The action of the States in this respect is most interesting. The position of a few of them will be given. Massachusetts, New Hampshire, Rhode Island, Virginia, South Carolina, and New York in their acts of ratification asked for Amendments to the Constitution to secure to the people of the

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States their personal and political rights. In Massachusetts, after reciting the fact that certain Amendments would remove the fear of "many of the good people of this Commonwealth and more effectually guard against the undue administration of the Federal Government," the Convention recommended the following Amendment: "That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised." The other States mentioned recommended practically the same Amendment, showing their anxiety about the preservation of their rights secured to them by the States. Rhode Island, New York, and Virginia were specially careful in the language of their ratifications. Rhode Island declared "That the powers of Government may be *reassumed* by the people whensoever it shall become necessary to their happiness." New York in its ratification used exactly the same language as Rhode Island. Virginia declared in her act of ratification, "That the powers granted under the Constitution being derived from the people of the United States may be *resumed* by them whensoever the same shall be perverted to their injury or oppression." Congress at once proposed twelve Amendments to the States for adoption, ten of which were immediately adopted and became parts of the Constitution. These Amendments are recognized as the Bill of Rights to the Constitution for which so many plead before its adoption. And in these Amendments are imbedded many of the fundamental principles of civil and religious liberty which so many opponents of the Constitution had fought to secure. These rights pertain to the people as citizens of their several States. And their security against invasion by the Federal Government was successfully accomplished in the adoption of the Amendments. The Supreme Court has repeatedly held that these Amendments are limitations upon the Federal government alone.

§ 368. Speaking of the Amendments to the Constitution, Judge Miller says:¹

¹ Miller's "Lectures on the Constitution," p. 13.

"Hence a very slight examination of them shows that all of them are restrictions upon the power of the general Government, or upon the modes of exercising that power, or declarations of the powers remaining with the States and with the people. They establish certain private rights of persons and property which the general government may not violate."

The history of the ratification of the Constitution by the several States shows that it is at least doubtful whether it would ever have received the sanction of the people of the States but for the assurance of the adoption of the Amendments proposed. In Virginia it was ratified by a majority of only 10 in a body composed of 168 delegates. In New York by a majority of 3 in a convention composed of 57 delegates. In Massachusetts by a majority of 19 in a convention composed of 325 members. Virginia, New York, and Massachusetts, the first two at that time constituting the largest States of the Union, only ratified the Constitution by the meagre majorities referred to. "The fundamental liberties of the people," referred to in this branch of our subject, are mostly found in these Ten Amendments. The Constitution is supreme. The Amendments are a part of that Constitution. Its supremacy covers every article in the instrument and every Amendment to it. The treaty-making power is exclusive in the President and Senate, for this power is denied to the States in Article I, § 10, and a treaty may embrace practically every subject including these fundamental rights. And if the treaty power may make agreements touching these rights, it has the power to modify or destroy them.

§ 369. Of course the States that demanded the incorporation of these rights by Amendments in the Constitution never dreamed that they could be taken from them by the treaty-making power after the Federal government, by the adoption of the Amendments, had been denied the right of interference with them. These fundamental rights would never have been demanded by the people and put into the Constitution by Amendments, only to be taken from them by this exclusive

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and supreme power as claimed: for the claim is boldly made that this is a pervasive, supreme, exclusive power permeating every avenue of human activity with no limit but its own unhampered will; a general power to control all subjects by treaty, among which may be many of the fundamental rights secured to the people in the Constitution and Amendments. The Constitution and the Amendments contain special prohibitions against the interference of the Government or any branch thereof in the maintenance of certain rights. These prohibitions are absolute — unconditioned — and apply to the Government of the United States and all departments thereof, including the treaty-making power. Can the supposed exclusive power in making treaties destroy the special prohibitions to all departments of the government? Is not the ordinary rule of construction, that where a general grant of power which may embrace all subjects, is subsequently limited in the same instrument by a specific prohibition, the latter prevails? The basic principle which controls the construction of all written instruments, as well as written constitutions, is the intent of the makers of each. A general grant in a written instrument, exclusive in its nature, must be limited by a special grant in the same instrument, which conflicts with the former, or by a special prohibition in the same instrument, limiting the general grant by the exclusion of the subject prohibited.

§ 370. Now the Constitution undoubtedly, taken by itself and construing the words in their natural and ordinary import, without relation to any other clause in it gives to the treaty-making power supremacy and unlimited scope as to subjects, for practically every personal and property right may become the subject of agreement, but this same instrument that has created this unlimited power, in other Articles of the Constitution, and in the Amendments thereto, excludes certain subjects from the treaty-making power or any other power by direct and specific prohibition on all departments of the government. For example, Article I, § 9, declares the privilege of the "writ of Habeas Corpus shall not be suspended unless," etc. or, "No

title of nobility shall be granted by the United States," or Amendment V, "No person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury," etc., or Amendment VI, "The accused shall enjoy the right to a speedy and public trial by an impartial jury," etc. These and numerous other prohibitions, some on Congress, some on the Executive, some general, but all prohibiting the government or some department thereof from doing certain things are only "as sounding brass, or a tinkling cymbal" if the treaty power may override them, for they clearly show that the rights secured cannot be the subjects of legislation or control of any power within the Constitution that may affect or endanger their security. And, since these rights might be embraced among the unlimited number of subjects to which a treaty might apply, if they were not thus specifically excluded, the enumeration of them in the Amendments and the earnest efforts put forth by many of the States of the Union for their incorporation into the Constitution at the time of its ratification, leave no doubt that they should be and are secure from modification or destruction by the treaty-making power. Nor is this conclusion arrived at by any strained construction, for it is reached by applying the ordinary rules of construction to all written instruments, and while of course it is true that a constitution is to be construed on a broader basis than ordinary commercial written instruments, still, in the respects referred to, we have judicial sanction for its correctness.

Justice White in *Downes v. Bidwell*¹ says:

"It is conceded at once that the true rule of construction is not to accept one provision of the Constitution alone but to contemplate all and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies and not by the letter which killeth."

¹ 182 U. S. p. 312, 45 L. ed. 1088, 21 S. C. 770.

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§ 371. Some other examples will serve to elucidate the subject. Article II, § 1, declares: "No person except a natural born citizen or a citizen of the United States, at the time of the adoption of this Constitution shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States." In the face of this provision, could it be claimed that a naturalized citizen of England, France, or Germany could by a treaty giving such right, be made eligible to the Presidency of the United States by a provision in a treaty eliminating these Constitutional provisions as to birth, age and residence; or could any advocate of the unlimited treaty-making power be found bold enough to claim that the right of trial by jury for all crimes could be destroyed by the ratification of a treaty between the United States and any foreign country wherein it was agreed that the trial of persons for crimes should be determined by the judge to the exclusion of a jury?

If the limitation on the treaty power stated above in Number I, § 366, be not correct and sound, then is our Constitutional system of government a delusion and a snare. To deny the principle therein formulated is to deny the effectiveness of a written constitution, and to affirm the hopelessness, under such a constitution, of securing the guaranteed liberties of the people.

§ 372. II. "That a Treaty cannot bind the United States by any agreement to do what is expressly or impliedly forbidden in the Constitution." Much that has been said under I (§§ 366-371) will apply to this division of our subject. For, if the Constitution forbids an act, such as the suspension of the writ of *habeas corpus* except, etc., or the trial of a prisoner except by jury, or the making of a law respecting the establishment of religion, or the abolition of the militia, or any of those fundamental rights, it is clear that though a general and exclusive power may have been granted to the treaty power, that such general and exclusive grant is limited by specific prohibitions in the same instrument.

It would seem that whether the proposition stated in this subdivision is correct or not depends largely upon the true interpretation of Article VI of the Constitution, and unless treaties referred to in that Article are supreme over the Constitution itself, surely no treaty can contain what is forbidden in the Constitution to be done by any power. Were this the case, then our Government would be not a government under the Constitution, but a government under the treaty power. Such claim would seem to be untenable and is clearly denied by Story, Cooley, Pomeroy, and all standard authorities on the Constitution. For, without quoting again their language, they all hold that a treaty that changes or attempts to change the Constitution of the country is invalid. It is, of course, invalid because the Constitution is superior to the treaty-making power, or any other power that it contains.

§ 373. III. "That a power granted in the Constitution to be exercised by a certain department of the Government and in a certain way, cannot be validly exercised by a treaty in disregard of the manner prescribed in the Constitution."

Judge Story¹ says:

"A power given by the Constitution cannot be construed to authorize a *destruction of other powers given in the same instrument.*² It must be construed therefore in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other."

In a note to this section Judge Story says:

"Mr. Jefferson seems at one time to have thought that the Constitution only meant to authorize the President and Senate to carry into effect, by way of treaty, *any power they might constitutionally exercise.* At the same time he admits that he was sensible of the weak points of this position.³ What are such powers given to the President and Senate? Could they make appointment by treaty?"

¹ Story on the Constitution, § 1508.

² Author's italics.

³ Jefferson's Correspondence, 498.

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In our Constitutional history this has been most commonly seen where the attempt has been made to legislate by treaties, without the action of the House of Representatives. Article I, § 1, reads: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The exclusive grant of power to the President and Senate to make treaties is here expressly limited by the exclusive grant of "all legislative powers" to Congress. Story, Cooley, Pomeroy, Tucker, and others, all assert that the treaty-making power cannot change our form of government. Our form of government is prescribed in the Constitution; the basic principle of which is the division of all powers into the executive, legislative, and judicial functions, each separate and independent of the other.

§ 374. The first section of the first Article, at the very threshold of the Constitution, declares: "All legislative powers herein granted shall be vested in a Congress," etc. How, then, can any legislative powers be taken from the Congress, the repository of *all* legislative powers, and be given to another branch of the government, which is not a legislative department of the government, without a change of the form of government? No policy is more firmly rooted in our governmental system than this, that under the Constitution we enjoy a representative government wherein the laws demanded and required by the people are considered by their delegates in the House of Representatives, where records of their votes are kept and published so that the people may know how those who are charged with the duty of representing them, have discharged those duties; and so jealous of this right were the makers of the Constitution that Article I, § 5, declares: "Each House shall keep a journal of its proceedings, and from time to time, publish the same, excepting such parts as may, in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal." Could proof be stronger

than this of the right of the people to know how those to whom they have intrusted the power to legislate are fulfilling the trust? They took no chances in this matter but placed it in the Constitution itself that there might be no doubt throughout the continuance of the government of the right of the people to know by the records how their representatives were living up to their promises. If the treaty-making power, hedged about by secrecy, acting behind closed doors, with no ear to hear and no eye to see what is transpiring, excluding the members of the House — one branch of the legislative power (and in many cases primarily responsible for legislation), can enter into competition with Congress in the field of legislation, and can even oust Congress of its exclusive constitutional grant of the power to legislate, then indeed is our Constitution changed. If the President and Senate undertake to legislate, they undertake a hopeless task, because the Constitution declares that Congress, and Congress alone, can legislate. If the treaty power can exclude from participation in legislation those who are primarily responsible to the people for legislation, who are sent to the House of Representatives charged with certain legislative commissions and pledged to their accomplishment, it can in effect drive from their Father's House the representatives of the people and deny them a right, which the Constitution declares they must assume, to make any legislation valid under the Constitution.¹

§ 375. IV. "That a treaty cannot change the form of the government of the United States." This proposition seems so self-evident that it need not be discussed, for the Constitution has provided in Article V how it may be changed, and that is, by amendment. And every authority that has written on the Constitution or on the treaty-making power, and judges who have considered the question in their opinions all agree that whatever may be the extent and scope of the treaty-making power, that at least it does not extend to the right to change the form of government of the United States. I shall therefore

¹ For full discussion of this subject see Chapter VI.

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content myself with simply giving a reference to the authorities in a note on this subject.¹

§ 376. V. "Personal and property rights of every kind and description may be the subject of treaties. Whenever the control or protection of such rights is, under the Constitution, confided to any department of the government or to a State, such department, or State, as the constitutional repository of such rights, cannot be ousted of their jurisdiction by having the same transferred to the treaty-making power." Rights confided to certain departments of the Government have been considered under III, § 373, so that this division relates to the police power and the reserved rights of the States, and has been heretofore considered fully.²

§ 377. VI. "That the treaty power cannot confer greater rights upon foreigners than are accorded citizens of the United States under the Constitution." This proposition would seem to be self-evident from the very nature and object of governments, and therefore, needs no discussion.

§ 378. If it be urged that these limitations upon the treaty power, though admitted to be in accordance with a correct constitutional interpretation of that power, so restrict the power as to render it valueless as a *nexus* between the United States and foreign powers in the adjustment of international rights, the answer is simple. Constitutions are made to meet the demands and requirements of the people who make them and live under them, and whenever a constitution is inadequate to meet such needs, it is only proper that it be changed or amended. Yet, in proposing amendments to our Constitution that has

¹ Story, "Constitution," § 1508.

Cooley, "Principles of Constitutional Law," p. 117.

Tucker, "Constitution," Vol. II, 354.

Pomeroy, "Constitution," pp. 507, 675.

Devlin, "Treaty-making Power," pp. 140, 143.

Willoughby, "Constitution," p. 493.

To these authorities may be added the names of every judge in the Supreme Court of the United States who has had this subject before him for consideration.

² See Chapter X, p. 281.

proven itself equal to all emergencies in our history, care should be had that no fundamental granitic principle upon which the Government has rested securely since its foundation, should be disturbed. But, if it be found that some stone of the superstructure was originally improperly placed, or, if properly laid, has become worn by abuse or corroded by occult processes, unforeseen by the student of governmental architecture in its building, surely the hand will not be deemed impious that is lifted to adjust the misplaced stone, or that seeks with loving touch to apply some life-giving lotion to the wasted portion of this "Ark of the Covenant" of our hopes and aspirations. The Constitution has proven adequate for the development of an infant republic, as well as for the progress of a matured nation; it has weathered the storm of Civil War and its attendant evils, and we should be careful, therefore, that the changes suggested should not be organic, but functional; not fundamental, but structural. If the limitations suggested are evils, and they are upheld by the Constitution, then the Constitution should be changed unless, indeed, such changes should result in the organic and fundamental change of our whole government. We can well afford to follow President Washington on this subject when he says:

"If, in the opinion of the people, the distribution of the constitutional powers be in any particular wrong, let it be corrected in the way which the Constitution designates. But let there be no change by usurpation, for this, though it may in one instance be the instrument of good, is the ordinary weapon by which free governments are destroyed."

No less suggestive is the language of President Lincoln:

"It is my duty and my oath to maintain inviolate the right of the States to order and control, under the Constitution, their own affairs by their own judgment exclusively. Such maintenance is essential for the preservation of that balance of power on which our institutions rest."

§ 379. Let us not, therefore, be guilty of committing wrong that good may come of it. If it be argued that no restriction

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of this power is compatible with national existence and national obligations, in the crises which arise in the history of every country, I would answer in the impressive language of Justice David Davis¹ spoken at a most critical period of our country's existence, when, combating the claim that the exigencies of the times following the Civil War demanded a broader construction of the Constitution, he said:

"No doctrine involving more pernicious consequences was ever invented by the wit of man, *than that any of its provisions can be suspended during any of the great exigencies of government.*"² Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false; for the government within the Constitution has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the results of the great effort to throw off its just authority."

The settlement of America was for the avowed purpose of developing the two great principles of civil and religious liberty under republican institutions, freed from the restraint of monarchical ideas. Our fathers brought with them the Christian religion as their religion, which has spread its benign influence from ocean to ocean in its teachings of high ideals and in the diffusion of the soundest principles of morality and virtue. Under these teachings "might" does not make "right," but governmental action must be sanctioned by moral principles. Human laws and constitutions should be controlled by them, for these are made and ratified as the security for human liberty. To disregard the Constitution under the plea of supposed necessity, is to adopt the specious plea of tyrants in all ages. To abandon our Constitutional Government and supplant it with the fleeting suggestion of some supposed temporary necessity, is to deny that this is a government of law, and to accept the fallacy that it is a government of men. Should we be guilty of such folly there will most surely arise in the near future some

¹ *Ex Parte Milligan*, 4 Wall. 109, 18 L. ed. 281.

² Author's italics.

Poet-statesman who will depict the moral delinquency of our generation in flowing verse similar in sentiment to that recorded by the ancient Latin poet, who, in describing the ethics of the Eternal City in his day, in the advice of a father to his son, said :
"*Rem facias, rem, si possis recte; si non, quocunque modo rem.*"

C. WILLIAM E. MIKELL--LIMITATIONS ON TREATY POWER
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THE EXTENT OF THE TREATY-MAKING POWER
 OF THE PRESIDENT AND SENATE OF THE
 UNITED STATES.

Something has been written on the extent of the treaty-making power of the President and the Senate. Little has been decided.

While the courts have frequently decided questions involving treaties, most of these decisions have been confined to the determination of the question whether a right claimed under the treaty in question was covered by the terms of the treaty, or whether such right, if within the scope of the treaty, had been taken away by subsequent legislation. A very few cases have involved a determination of the extent of the treaty-making power, and in these few the point decided is so narrow, was so inadequately, or not at all argued, or has been rendered so doubtful by dicta of later judges of the Supreme Court as to leave the whole question open.

There are only four clauses in the Constitution and its amendments, in which treaties are mentioned. The first is a prohibition on the States: "No State shall enter into any treaty, alliance, or confederation." Art. I., § 10, cl. 1. The second designates the repository of the power: "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Art. II., § 2, cl. 2

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The third gives the federal courts jurisdiction in cases arising under treaties: "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority." Art. III., § 2.

The fourth provides for the legal effect of a treaty. "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Art. VI. § 2.

There is another clause which provides: "No State shall, without the consent of Congress, enter into any agreement or compact with another State or with a foreign power * * *." Art. I., § 10, cl. 2.

It will be seen from a reading of these provisions that the treaty-making power is not in terms either limited or made unlimited. It is not, in terms, made absolute, as if it had been provided that all other powers granted or reserved by this Constitution shall be subject to the treaty-making power, but neither is it in terms limited, as if it had been provided that this power shall not be used to deprive any other departments of the federal government, or the States, of any powers vested in or reserved to them respectively. Is the treaty-making power then limited, or absolute? All who have written on the question agree that it is limited, though all do not agree where the limitation should be placed.¹

If, as is admitted, the treaty-making power is impliedly

¹ In the early part of the 19th century some members of Congress, in *debate*, seem to have held the view that this power was unlimited. In the debate on the Louisiana treaty, Senator Cocke, of Tennessee, said: "I would ask what are the constitutional limitations? (on the treaty-making power) It has none, sir, in that respect, and I contend that the treaty-making powers are competent to the full and free exercise of their best judgment in making treaties, *without limitation of power*." *Annals of Cong.* (1803-1804), p. 71.

limited, what are the limitations on it? The general answer, in whatever form it is expressed, is that it is limited by other provisions of the Constitution.

The following extracts show the differing views that have been expressed on this question:

"As a sovereign power, invested with the sole management of foreign relations, they must have the right to make treaties of every nature and on every subject which the Constitution does not expressly or impliedly exclude." Simeon E. Baldwin, 7 Col. L. Rev., p. 90.

"A treaty to change the organization of the government or annihilate its sovereignty, to overturn its republican form or to deprive it of its constitutional powers, would be void, because it would destroy what it was designed merely to fulfil, the will of the people." Story on the Const., § 1508.

"By treaty we may not alter the constitutional distribution of powers between the three departments of our Federal Government, or confer on any department a power not conferred on it by the Constitution. . . . A treaty cannot . . . violate any specific general restriction on federal power which may be found in the Constitution. . . . There are . . . implied limitations on the treaty-making power . . . arising out of the fact that the Constitution was adopted by a free people imbued with the importance of individual liberty and firmly believing in democratic institutions. Wm. Draper Lewis, 55 Am. L. Reg., pp. 80-82.

Field, J., in *De Geofroy v. Riggs*, 10 Sup. Ct. Rep., p. 297, says: "The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the States." Another writer declares: "The treaty-making power is pre-eminently a commercial power. It should not be made to interfere with domestic policy and local home rule." Andrew A. Bruce, 54 Am. L. Reg., p. 699.

Cooley says: "The Constitution imposes no restriction upon this power, but it is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the government or any of the States of its constitutional authority." Const. Law, 103.

Butler, in his two-volume work on the Treaty-Making Power, says: ". . . the exercise thereof is controlled not only by constitutional limitations, but also by the general rules of law applicable to all sovereign powers and to their exercise of this prerogative." p. 4. Mr. Butler thinks that the treaty-making power "is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that government as an attribute of sovereignty," *ibid.* p. 5.

Pomeroy, *Introduc. to Const. L. of U. S.*, pp. 559-571, says: "This power cannot be used to deprive Congress or the Judiciary or the President of any general powers which are granted by the Constitution."

White, J., in *Downes v. Bidwell*, denied the general proposition that territory of the United States may, as a mere act of sale, be disposed of. "Though," he says, "from the exigencies of a calamitous war or the settlement of boundaries it may be that citizens of the United States may be expatriated by the act of the treaty-making power, impliedly or expressly ratified by Congress," 182 U. S. 317.

A limitation is implied "from the nature of the government itself, and of that of the States," says one.¹

It is "subject to the implied restriction that nothing can be done under it which changes the Constitution of the country or robs a department of the government or of any of the States of its constitutional authority," says another.²

It is said by another writer to be impliedly controlled "not only by constitutional limitations, but also by the general rules of law applicable to all sovereign powers and to their exercise of this prerogative."³

Another says, a limitation is implied from "the nature of our institutions and the distribution of powers between the general government and the State governments."⁴

A limitation is also said be implied from "the existence

Swayne, J., in *The Cherokee Tobacco*, 11 Wall., p. 620, says: "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government."

Taney, C. J., says: "The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it, and consequently it was designed to include all those subjects which, in the ordinary intercourse of nations, had usually been made subjects of negotiation and treaty, and which are consistent with the nature of our institutions and the distribution of powers between the general and state governments." *Holmes v. Jennison*, 11 Pet., p. 569.

Daniel, J., in the *License Cases*, 5 How., p. 613, says: "Laws of the United States in order to be binding must be within the legitimate powers vested by the Constitution. Treaties to be valid must be within the scope of the same powers, for there can be no 'authority of the United States' save what is derived mediately or immediately and regularly and legitimately from the Constitution. A treaty no more than an ordinary statute can arbitrarily cede away any one right of a state or of a citizen of a state."

"If the people of the several states of this union reserved to themselves [which he holds they did] the power of expelling from their borders any person or class of persons whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right and authorizing the introduction of any person or description of persons against the consent of the state would be an usurpation of power which this court could neither recognize nor enforce." Taney, C. J., in *The Passenger Cases*, 7 How., p. 466.

¹ Field, J., in *De Geofrey v. Riggs*, 10 Sup. Ct. Rep. 297.

² Cooley, *Const. L.*, 103.

³ Butler, *Treaty-Making Power of the U. S.*, p. 4.

⁴ Taney, C. J., in *Holmes v. Jennison*, 11 Pet., p. 569.

of the States, parties to the confederation, having control for most purposes over their own territory."⁶

Some of these statements of the implied restrictions on the treaty-making power would seem to make the restriction as wide as the restrictions on Congress, others would make the restriction narrower. Most of this latter class are so indefinite that under them one might place the restriction where he pleased under a given state of facts and still be within the statement of the implied restriction.⁷

It is a general principle of constitutional law that any given provision of the Constitution must be construed in the light of other provisions of the same instrument. Are there then any provisions in the Constitution which impliedly limit the treaty-making power, so that if a treaty be made which conflicts with such provisions, such treaty would be unconstitutional? If so, what are they?

By our constitution a certain form of government is created; the governing power is divided into three general departments; the constitution of these departments is provided for; certain enumerated powers are conferred on this government; certain other powers are denied to it generally, or denied to certain departments of it; of the powers conferred some are vested in congress; some in the executive; one in the executive and one branch of the legislative; some in the judiciary; some are prohibited to the States. Finally all powers not granted to the federal government or prohibited to the States are reserved to the States or to the people.

A treaty then may possibly be unconstitutional in any of the following cases: (1) If it alters the form of our government; (2) If it alters the general departmental con-

⁶ Woolsey, *Internat. Law*, § 99.

⁷ *E. g.*, Under Mr. Butler's statement, above, that the treaty power is controlled by "constitutional limitations," he arrives at the conclusion that by treaty the Federal Government can alienate the territory of a state. While under Justice Field's statement that a limitation is implied "from the nature of the government itself and that of the states," Mr. Justice Field says it would not be contended that such territory could be alienated without the consent of the state.

struction of the government; (3) If it changes the constitution of any of the departments; (4) If it deprives the federal government or any of its departments of its delegated powers, or transfers such power to another department; (5) If it seeks to exercise a power confided to another department of the federal government; (6) If by it it is sought to exercise a power prohibited to the federal government or reserved to the States.

A TREATY ALTERING THE FORM OF THE GOVERNMENT.

It is universally admitted that a treaty though negotiated in the constitutional method by the President and two-thirds of the Senate, the effect of which would be to alter our form of government from a republic to, say, a monarchy, would be unconstitutional. The President and Senate are not only not expressly forbidden to make such a treaty, as Congress is forbidden to make a law abridging freedom of speech, or as the federal courts are forbidden to entertain a suit against a State by a citizen of another State, but the supposed alteration is not even forbidden in general terms, such as the abridgment of the right of the people to bear arms is forbidden. Why then, since the constitution says the President and three-fourths of the Senate "shall have power to make treaties," and places no limit on that power, and no limitation on this particular exercise of the power is found anywhere in the Constitution, would such a treaty be void? Story answers—because "a power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument; it must be construed therefore in subordination to it and cannot supercede or interfere with any other of its fundamental provisions." But why can it not be so construed? Story again answers—"because to so construe it would destroy what it [the Constitution] was designed merely to fulfil, the will of the people."⁸ Another form of the answer, commonly

⁸ Story on the Const., § 1508; Taney, C. J., in *Holmes v. Jennison*, 11 Pet., p. 569, gives as the reason that the framers of the Constitution did not intend to vest such power in the treaty-making power.

given, is that "the treaty power cannot be used to change the constitution."

To these reasons for limiting the power it might be answered that since the people or States in conferring the treaty-making power conferred it without any limitation, it was their will that it should be without limitation; that their will was to confer it absolutely, as it appears in the language of the section conferring it; that if they had not so willed they would have expressed some restriction, as they did in conferring power on Congress. To strengthen this position there might be further pointed out the necessity for the vesting of such absolute and unrestricted power by showing that it is impossible to foresee what complications may arise in the future which might necessitate even such a radical step as a change in our form of government; *e. g.*, a calamitous and unsuccessful war; and that the President and Senate should be clothed with power to meet such an emergency. To the reason frequently given, that the treaty-power cannot be used to change the constitution, the simple answer is that if the constitution, as appears on its face, vests the treaty-making power unlimited, it is not changing the constitution to so construe it. None, even the most zealous in upholding the prerogative of the treaty-making power, have as yet advanced this argument in support of the power of the President and Senate to change our form of government. Nor is it conceivable that this argument would receive serious consideration from any student of constitutional law or from any court empowered to interpret the Constitution.

VALIDITY OF A TREATY ALTERING THE GENERAL DEPARTMENTAL ORGANIZATION OF THE GOVERNMENT.

It is likewise admitted that a treaty which should undertake to alter our tripartite system of government, *e. g.*, to abolish one of the departments, executive, legislative or judicial, would be unconstitutional. The reasons assigned are the same as those given above:—it was the "will of the

people" that it should be otherwise, or "a treaty cannot change the constitution." The answer suggested above would be as conclusive in this case as in the first.

VALIDITY OF A TREATY CHANGING THE ORGANIZATION
OR CONSTITUTION OF ANY OF THE DEPARTMENTS OF
THE GOVERNMENT.

It is also admitted that the President and Senate have no power to make a treaty changing the constitution or organization of any department of the Federal Government, *e. g.*, a treaty providing that each State or a certain State should be entitled to three Senators, or that an alien born should be eligible for the Presidency, or that members of the House should be appointed by the President, or that the President should be a court of last resort for foreigners, above the Supreme Court. The same reason of Story might be given for the invalidity of such a treaty—it was "the will of the people" that these departments should not be altered by treaty. The same answer—it was the "will of the people" that the treaty-power should be absolute, since they did not limit it—might be made. In this class of cases however a further reason might be given. The Constitution does not specifically provide that the government shall be a republic, or a federal state. That it is such is an inference from many provisions of the Constitution construed together, but in this case (and the immediately preceding) the Constitution specifically provides for certain departments of the government and for the manner in which the departments shall be organized: "The Senate . . . shall be composed of two Senators from each State chosen by the legislature thereof;" "No person except a natural-born citizen . . . shall be eligible to the office of President." But this form of the answer is only another way of stating the "will of the people" answer, and is open to the same reply. True, the Constitution does provide for the organization of the departments, but it also vests a treaty-making power in the President and Senate, and leaves

that power unlimited, hence although until the power is exercised in a manner to change the composition of a department, the composition of that department must remain as provided for by the Constitution, when the President and Senate, by virtue of their unlimited power, choose by a treaty to change it, they may do so. The argument from necessity, too, is as valid in these cases as in the first. How necessary, it may be said, is the possession of such power in the President and Senate! and how wise were the framers of the Constitution in investing them with it. Suppose it should be our ill fortune to wage an unsuccessful war with Japan, and she should demand as the price of peace that the Presidency should be open to the candidacy of Japanese residents, educated under treaty rights in the schools of California. Is it possible that there is no power to end the war by making such a treaty! Is a sovereign nation so helpless! Yet such is the state to which all of our publicists, and all of our judges who have spoken on the subject would reduce us.

A TREATY DEPRIVING THE FEDERAL GOVERNMENT OF ITS
DELEGATED POWERS.

It is also said by Story, and denied by none, that a treaty which undertook to deprive the federal government of its delegated powers, *e. g.*, one that vested the power over interstate commerce, or the treaty-making power itself in some other government or revested it in the States, would be unconstitutional. The same reason is given for this limitation. The same answer suggested above might be made to the reason as given.

VALIDITY OF A TREATY THAT SEEKS TO EXERCISE A POWER
CONFERRED BY THE CONSTITUTION ON ANOTHER DE-
PARTMENT OF THE FEDERAL GOVERNMENT.

We here come to a class of cases which differ in this respect from the preceding—heretofore the things supposed to be attempted by treaty were things which no other de-

partment of the government is specifically given power to do; under this head we are to consider things which admittedly are within the power vested in the federal government, the power to do which, however, is specifically confided to a department other than the treaty-making power. Under this head would fall a treaty which, without the consent of Congress, undertook to regulate interstate or foreign commerce; which undertook to establish courts; to suspend the writ of *habeas corpus*; to expel a member of Congress; to fix the compensation of federal officers; to raise revenue; to lay taxes; to establish a rule of naturalization; to provide for the punishment of crime; to declare war; to provide for the government of the District of Columbia; to levy taxes, or to admit new States into the Union. These are some of the things the Constitution says Congress shall have power to do.⁹ Can the President and two-thirds of the Senate by a treaty do them without the consent of one branch of Congress—the House of Representatives?

If the President and Senate can make a treaty with England providing for the regulation of commerce between the United States and England without the assent of the House, and such a treaty is, what the Constitution says treaties shall be, the supreme law of the land—and it is idle to talk of the *power* to make such treaty if such treaty when made is not effective—then they can make such a treaty with all foreign countries and concerning all commerce with such countries. If this should be done, has not Congress been deprived of the power, which the Constitution says it shall have, to regulate commerce? Has not the

⁹It need not be said that reference is here had to the power over particular things vested in Congress, not to the general power given to Congress to make laws necessary for carrying into execution the powers vested specifically in other departments of the Federal Government. This last is a power super-added to the powers committed to Congress for the purpose of assisting other departments in the execution of powers intrusted not to Congress, but to such other departments. Of course, this power of Congress is conditioned on the power of such other department. It can neither add to nor take away from the power of any other department.

treaty-making power been used to "change the Constitution"? It has, unless we adopt the argument that since the treaty-making power was given without limitation in terms, it was intended to be unlimited, and hence the Constitution is not changed by so holding it—an argument repudiated above as equally forcible in proving that the treaty-making power may change our form of government, or cede or recede the powers vested in the federal government.

The same considerations apply to the other powers vested in Congress.

To Congress is confided the power to declare war. If the President and Senate may by a treaty exercise this power and such treaty is the supreme law of the land, what becomes of the power which the Constitution says Congress shall have to declare war?¹⁰

Congress is given the power to lay, and collect taxes, would not an exercise of this power by the President and the Senate change that clause of the constitution that grants this power to Congress?¹¹

If, under the treaty power, armies may be raised and equipped, or if by the exercise of that power the country may be bound to keep an army in the field, or provide a navy, or call forth the militia, or do any of the things committed to Congress without the consent or against the vote of the House of Representatives, what becomes of the pro-

¹⁰ In *Head Money Cases*, 112 U. S., at p. 599, Mr. Justice Miller, delivering the opinion of the Court, says: "A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the two. If there be any difference in this respect, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a *declaration of war*, which *must be made by Congress*, and which, when made, usually suspends or destroys existing treaties between the nations thus at war." (Italics the present writer's.)

¹¹ Chief Justice Fuller, speaking for himself, Harlan, Brewer and Peckham, JJ., says, in *Downes v. Bidwell*, 182 U. S., p. 370, "It certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement with a foreign nation by the President and two-thirds of a quorum of the Senate."

visions of the Constitution which say Congress shall have power to do these things?

The same result is reached by another line of reasoning. If Congress, or a constituent part of Congress, may be deprived by the treaty power of one of the powers vested in it by the constitution, it may be deprived of all, in which case that is in effect done what all admit cannot be done, our tripartite organization of government is destroyed—the power to make treaties has become a power to abolish in effect a constituent part of the government and that part which was intended to reflect most directly the will of the people.

If, as held by Chief Justice Marshall,¹³ a state cannot tax a Federal Bank because such state might conceivably tax it so greatly as to destroy it, and it has no power to destroy, it would seem to follow by parity of reasoning that, if the treaty-making power has no power to destroy the House of Representatives, it has no power to exercise those powers of Congress which if exercised fully by it would result in the destruction of the House.

If the treaty-making power has this extent even the right of the House, heretofore thought to be necessary to a free government, to originate measures for raising revenue would not be safe from it. The Constitution provides only that "all *bills* for raising revenue shall originate in the House of Representatives;" but since a treaty is not a "bill," a treaty imposing a tax or containing tariff provisions would not run foul of this limitation.

Nor is it an answer to say that the power is not really taken from the House of Representatives since a bill may be passed by Congress overruling the treaty. Such bill cannot be passed by the House alone, but would require the consent of the Senate, which by the assumption is acting with the President in opposition to the House.

It may be answered to this that there is no more deprivation of any right of the House in this case than in any case

¹³ *McCulloch v. Maryland*, 4 Wheat. 316.

where the Senate refuses to acquiesce in a bill passed by the House, or the President vetoes a bill passed by both. There is this radical difference in the cases; the people of the United States by the Constitution have given Congress—a majority of the House plus a majority of the Senate plus the President, or two-thirds of the House plus two-thirds of the Senate, without the concurrence of the President—the power to enact legislation on certain specified subjects. The people have not said they *must* enact legislation on these subjects, but that they *may*—if the House wishes to enact such legislation, but is opposed by the Senate, the legislation is not enacted—power given Congress has simply not been used. In case, however, the President and Senate make a treaty on a subject over which power is given to the House, the Senate and the President, acting concurrently, the power *has* been used, the law has been enacted, a new rule of conduct has been imposed on the people, by substituting a foreign country or an Indian chief for the House of Representatives. In other words, in the ordinary case of the failure of the Senate to agree with the House no legislation is enacted, hence no power is exercised, but in the case of a treaty such power is exercised and exercised not by Congress, as provided by the Constitution, but by the treaty-making power.

On this phase of our subject—the right of the treaty-making power to do by treaty what Congress has by the Constitution been entrusted with—we are not without a guide. One branch of the treaty-making power itself has gone on record denying this power.

In 1844, April 12, a treaty was signed at Washington, between the United States and the Republic of Texas, by which Texas transferred to the United States all its rights of separate and independent sovereignty and jurisdiction. Three resolutions were introduced by Mr. Benton, May 13. They declared that the ratification of the treaty would be the adoption by the United States of the Texan War, and that the treaty-making power of the President and Senate did not include the power of making war, either by declara-

tion or adoption. On June 8, the treaty was rejected by the Senate by a vote of 35 to 16.

Immediately preceding the rejection of the treaty a resolution was introduced by Mr. Henderson declaring that "such annexation would be properly achieved . . . by *an act of Congress* admitting the people of Texas, with defined boundaries, as a new State into the Union."

This course was followed and on March 1st, 1845, a joint resolution to that effect was approved.¹³

Another phase of this question has been several times at issue between the treaty-power and the House, viz., the power of the President and Senate to make treaties requiring the payment of money by the United States, without the concurrence of the House or, as it is usually expressed, the legal right of the House to refuse to appropriate money necessary to carry into effect a treaty made by the President and the Senate. The contest arose first in Washington's administration over the treaty with England. It was contended by Washington that under the Constitution a treaty when made was the supreme law of the land and therefore the House of Representatives was under an obligation, legal as well as moral, to obey such law by making the appropriation called for by the treaty and, that it would be disobeying the law if it refused so to do. Washington said that any other view of the question would be tantamount to a claim on the part of the House of the right to participate in the *making* of treaties. The House refused to acquiesce in this view of the treaty-power and, while disclaiming any agency in the making of treaties maintained the position that a treaty which provided for the payment of money by the United States must depend for its execution as to such provisions, on a law to be passed by Congress, and that it was the "constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect."¹⁴

¹³ See Crandell, *Treaties, Their Making and Enforcement*, 95 et seq.

¹⁴ Crandall, 122.

In 1868, in Johnson's administration, the same question arose over the Alaskan treaty and, after a conference between a committee of the two Houses, a bill was passed by both. After reciting that the treaty had been entered into by the President and Senate, and that stipulations for payment of money and the admission of certain of the inhabitants to citizenship could not be "carried into full force and effect except by legislation to which the *consent*" of both Houses of Congress was necessary, the bill authorized the appropriation.¹⁸

Thus Congress itself has answered the question as to the power of the President and Senate alone to make effective treaties on this particular subject intrusted to Congress. Indeed there is judicial authority directly holding that the treaty-making power does not extend to the appropriation of money. In the case of *Turner v. Am. Bap. Miss. Union*, 5 McLean, p. 347, McLean, J., said: "A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, *the treaty is not perfect*. It is not operative, in the sense of the Constitution as money cannot be appropriated by the treaty-making power. . . . And in such a case, the representatives of the people and the states exercise their own judg-

¹⁸ This bill was the result of a compromise between the House and the Senate, the House having originally passed a bill which read in part: "Whereas the subjects thus embraced in the stipulation [for the payment to Russia of \$7,200,000, and for the admission of certain of the inhabitants of the ceded territory to the enjoyment of the privileges and immunities of citizens of the United States] of said treaty are among the subjects which by the Constitution of the United States are submitted to the power of Congress, and over which Congress has jurisdiction; and it being for such reason necessary that the consent of Congress should be given to said stipulation before the same can have full force and effect . . . to the end that the same [the treaty] may be carried into effect. . . . Be it enacted, That the assent of Congress is hereby given to the stipulations of said treaty." Crandall.

ments in granting or withholding the money. They act upon their own responsibility and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know that so far as the treaty stipulates to pay money, the legislative sanction is required."

The history of treaties concerning revenue laws leads to the same conclusion.

The early treaties of this kind contained no reference to Congress, but the House invariably insisted that where the treaty was in conflict with an existing law it was not effective until the law was changed by Congress. And they made good their contention, the President always submitting the treaty with a recommendation that appropriate legislation be enacted, and the Senate always joining with the House in the bill changing the existing law.¹⁶

In later treaties it has been specifically provided in the treaty that the treaty should go into effect when, or only when, laws necessary to carry it into operation had been passed by Congress,¹⁷ or if not so provided in the treaty itself the Senate has attached an amendment to that effect.¹⁸

In two cases the action of the Senate and of the House has been even more significant. In the case of the reciprocity treaty with the German Zollverein of 1844 Rufus Choate, for the Committee on Foreign Relations of the Senate, reported against ratification. Without reference to the merits of the treaty, the committee was not prepared, he said, "to sanction so large an innovation upon ancient and uniform practice in respect of the department of the government by which duties on imports shall be imposed. . . . In the judgment of the committee the legislative is the department of government by which commerce should be regulated and laws of revenue be passed." The next year this position was reiterated by the Senate, and the treaty

¹⁶ See Crandall, pp. 140-145.

¹⁷ Crandall, pp. 142-143.

¹⁸ Crandall, 143-4.

remained unratified, though ratification was urged by the President.

In 1880 (January 26th) the House of Representatives passed a resolution declaring that the negotiation by the President and Senate of commercial treaties fixing the rates of duty on foreign goods "would, in view of the provisions of section 7 of Article I of the Constitution of the United States, be an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives."¹⁹

In the Act of Congress, passed in 1897, to carry into effect the treaty with Cuba relating to the tariff on sugar, a clause was inserted declaring that nothing in the Act should be construed on the part of the House that customs duties could be changed otherwise than by an Act of Congress originating in the House.²⁰

As in treaties appropriating money and raising revenue, so in other treaties involving matters confided by the Constitution to Congress, as treaties to protect copyrights, patents, trade-marks and treaties concerning postal regulations. While the compact with foreign governments is made by the treaty power, their local effect is determined by laws of Congress; for while it has never been judicially determined whether the treaty power is alone sufficient to give such treaty the effect of law,²¹ the Congress has always participated in the making of such treaty in the sense that no such treaty has ever been given effect, so far as the writer has been able to discover, that has not been directly authorized or consented to by both houses of Congress.

The history of the cession of territory to the United States is the same, and judicial authority confirms history. Justice

¹⁹ Crandall, 145.

²⁰ Crandall, p. 144.

²¹ The Supreme Court in *The Trade Mark Cases*, 100 U. S. 82, refused to discuss the question. The Court said: "In what we have here said we wish to be understood as leaving untouched the whole of the question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect."

White, concurring in *Downes v. Bidwell*, 182 U. S., p. 319, Shiras and McKenna, J.J., concurring, says: "When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surround them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been mooted."

He further says: "It seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the *express* or *implied* approval of Congress. . . . If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions."

But it may be said that the argument that treaties negotiated by the President and Senate which provide for things intrusted to Congress are not effective unless the House agrees to them by enacting appropriate legislation, does not go to the *power* of the President and Senate, but only to the effect of the treaty after it is made.

The Constitution says of treaties that they shall be the supreme law of the land. If the President and Senate have power to make the class of treaties under consideration without the consent of the House, then when made without such consent they must be the supreme law of the land. But if when so made they are not effective without legislation by Congress we have the phenomenon of a supreme law of the land binding no one in the land until another law orders the people of the land and the officers of the Government to obey it.

It is true the Supreme Court has said that some treaties are self-executing, while others require legislation to make

them effective, and that treaties of the former class are *ex proprio vigore* the supreme law of the land. No inference, however, can be drawn from this that the President and Senate have power, by so phrasing a treaty as to make it on its face self-executing, to oust the House of Representatives of its right to a voice in any law on a subject confided to it by the Constitution. Even Hamilton never suggested such an easy way to overcome a hostile legislature; the extent of his contention was that the House was under an obligation to pass the laws necessary for carrying the treaty into effect,²² and the courts have held treaties to be not self-executing, but to require legislation to give them the force of law, though they contained no provision which made their efficacy dependent on such legislation.²³

Furthermore, to hold that the President and Senate by casting a treaty in a self-executing form can oust the House of its prerogative in legislation would enable the President and Senate to do what no one has yet claimed for the treaty power. It would enable the President and Senate by simply incorporating into the treaty a provision for an appropriation to make it self-executing. By the assumption the treaty being self-executing, no action by the House would be necessary to make it effective; and being the supreme law of the land, the President by virtue of his constitutional duty to "see that the laws be faithfully executed" must carry it

²² See Letter to Washington, quoted in Crandall, 127.

²³ *Turner v. Am. Bap. Miss. Union*, 5 McLean, 344.

Iredell, J., in *Ware v. Hylton*, 3 Dall., p. 275, after pointing out that the language employed in the tariff treaty of 1786 between England and France is: "The two high contracting parties have thought proper to settle the duties on certain goods and merchandises . . . In consequence of which they have agreed upon the following tariff, &c.," and "His Britannic majesty reserves the right of countervailing, by additional duties on . . . linens, etc.," says: "Here is no mention of Parliament, and yet, no man living will say that a bare proclamation of the king, upon the ground of the treaty, would be an authority for the levying of any duties whatever, but it must be done in the constitutional mode, by act of Parliament, which affords an additional proof, that where anything of a legislative nature is in contemplation, it is constantly implied and understood (without express words) that it can alone be effected by the medium of the legislative authority."

into effect. Perhaps he might call on Congress to make the appropriation, but if Congress refused, since, after all, it is not the duty of Congress, but of the President, to execute the law, he might and should execute it by ordering the treasurer of the United States to pay the money provided for in the treaty, and on refusal of the treasurer, seize it, and himself make the appropriation. If the power to make a treaty self-executing exists in the President and Senate, this appropriation by the President would not violate the constitutional provision for the payment of money from the treasury, for Art. I, sec. 9, cl. 7, provides that "no money shall be drawn from the treasury but in consequence of appropriations made by law," and by the assumption such appropriation in the treaty would be made by law. If this be the law, what a pity it is that Washington and Johnson, their advisers and the Senates of their administrations did not know it. Much time that was lost and trouble that was encountered in trying to persuade the House of its duty to pass an act making the necessary appropriation called for by the Jay and the Alaskan treaties might have been saved by the simple expedient of inserting the necessary words of appropriation in the treaty itself. Yet if it is not the law it is only because the treaty-power cannot be used to deprive the House of any of the powers given it by the Constitution.

It may be said that although the Constitution gives Congress power to do these things it does not say that *only* Congress shall have such power, and as the power of the President and Senate is not limited it may do the same things by treaty. True, the Constitution does not say that *only* Congress shall exercise the powers conferred on Congress, except as it provides in Art. I, § 1, that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," and these are the legislative powers it then proceeds to vest in Congress, but then neither does it say that *only* the President and the Senate may make treaties. The language used in conferring the respective

powers and in providing for the effect of their exercise is identical—"He shall have power . . . to make treaties," "Congress shall have power to regulate commerce," etc., "all laws passed in pursuance thereof [the Constitution] and all treaties . . . shall be the supreme law of the land." The power given Congress is not on its face exclusive, and the power given the treaty-making power is not on its face exclusive; the power given the treaty-making power is on its face unlimited, the power given Congress in relation to the powers vested in it is on its face unlimited.

Any argument, then, drawn from the words of the Constitution which would give the treaty-making power the power to make a treaty having the force of law on a subject over which Congress is given power, without the concurrence of the House of Representatives, would give the Congress, by virtue of its unlimited power to regulate commerce, the right to make a treaty providing for such regulation of commerce. Likewise, any argument that would deny to Congress the right to make a treaty regulating foreign commerce [by virtue of its unlimited power to regulate such commerce] without the concurrence of the treaty-making power,²⁴ would deny the power of the President and Senate to make a valid treaty regulating such commerce, without the consent of the House. Of course, the same considerations which apply to the regulation of commerce apply equally to the other powers vested by the Constitution in Congress, for there is no difference in the language used to vest in Congress the power to regulate commerce and that used to vest any of the other powers confided to Congress.

There is involved here no question of "strict construction" or of "broad construction," for it is not a question of the conferring or reserving of a power, but of the repository or distribution of powers admittedly conferred on the federal government. A strict construction of the power of the President and Senate is a broad construction of the power of Congress and *vice versa*.

²⁴ The concurrence of two-thirds of the Senate would be necessary for the treaty.

How then are these seemingly conflicting powers to be reconciled. The writer ventures to suggest that our history has answered them correctly, and that that answer is this: That so far as the domestic or intraterritorial effect of the exercise of any of the powers committed by the Constitution to Congress are concerned, Congress alone has any power in the premises. But Congress has no power to treat with foreign nations, hence when any of these powers vested in Congress are to be exercised in agreement with a foreign power, the *agreement* with such foreign nation must first be completed by the treaty-making power, but this *agreement*, though it is a treaty in the meaning of that word as used in international law,³² is not a treaty in the sense intended by the Constitution when it says a treaty is the supreme law of the land. To be that, it must be sanctioned by an act of Congress. This view, it is submitted, not only does no violence to the Constitution, but on the contrary gives effect to the seemingly conflicting powers of the two departments without making one supreme over the other.

That the conclusion here arrived at is not a strained or narrow one, but the restriction contended to exist is politically a natural and fundamental one, is shown by the fact that similar restrictions exist in other countries. By the law of England, though the power of the King in international affairs in comparison with the power of parliament is greater than that of the President in comparison with Congress, as the King alone can directly make war and

³² This distinction between a treaty, as that word is used in international law, and as it is used in our Constitution, has been taken by the Supreme Court in *Hoover v. Yaker*, 9 Wall. 32. It was there held that while under the general principles of international law a treaty is binding from the date of its *signing*, and that the exchange of ratifications has a retroactive effect, that under our Constitution, since a treaty is declared to be the supreme law of the land, a different rule prevails when a treaty operates on individual rights. In such case it is not effective until it is ratified by the Senate and proclaimed. The same difference may be seen in the case where a treaty has been abrogated by a subsequent act of Congress. In such case the treaty as an agreement still subsists, but as the supreme law of the land it has been abrogated.

peace, yet no treaty made by the King which "involves either a charge on the people, or a change in the law of the land" can "be carried into effect without the sanction of parliament. Such treaties are therefore made subject to the approval of parliament. . . . Such are treaties of commerce . . ." ²⁶

By Art. LXVIII of the Constitution of Belgium, treaties of commerce and those that may burden the State, *i. e.*, impose financial obligations, or bind Belgians individually are not effective until they have received the assent of the Chambers; and no cession or exchange of territory may take place except by virtue of a law. ²⁷

In the Netherlands treaties for a change of territory, that impose pecuniary obligations on the kingdom or that contain any other provision concerning legal rights, require the approval of the States-General. ²⁸

A strict construction of the Fundamental Statute of Italy would require the assent of the Chambers only to treaties involving financial obligations and change of territory. "In practice, however, treaties of commerce as well as all treaties touching upon matters legally belonging to parliament are submitted to that body for ratification." ²⁹

Art. VIII of the Constitutional Law of France of 1875 provides: "The President of the Republic negotiates and ratifies treaties. He communicates them to the Chambers as soon as the interest and safety of the State permit. Treaties of peace, and of commerce, treaties which involve the finances of the State, those relating to the persons and property of French citizens in foreign countries, shall become definitive only after having been voted by the two chambers. No cession, no exchange, no annexation of territory shall take place except by virtue of a law." The practice of the French Chambers has been to give the

²⁶ II Anson, *Law and Cust. of the Const.*, p. 297.

²⁷ Crandall, p. 187.

²⁸ Crandall, p. 190.

²⁹ Crandall, p. 193.

widest scope to the meaning of the terms "commerce" and "finances" in this article, and treaties affecting only indirectly commerce and finance are ratified by the Chambers.⁸⁰

It is provided in Art. XI of the Constitution of 1871 of the German Empire that treaties which refer to matters which, according to Art. IV belong to the field of imperial legislation for their conclusion, the consent of the Bundesrath is necessary, and for their validity the approval of the Reichstag. Art. IV includes literary and industrial property, commerce, customs duties, citizenship and postal, telegraphic and railway matters.⁸¹

In Austria-Hungary the Austrian Constitution requires the consent of the Reichsrath to all commercial treaties and those that burden the State or a portion of it, or impose obligations on individual subjects, or make territorial changes.⁸²

The Constitution of Spain has similar provisions, and expressly provides that the legislation must precede ratification.⁸³

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(To be continued.)

⁸⁰ See Crandall, p. 178.

⁸¹ Crandall, 197.

⁸² Crandall, 200.

⁸³ Crandall, 205.

THE EXTENT OF THE TREATY MAKING POWER
OF THE PRESIDENT AND SENATE OF THE
UNITED STATES.

II.

VALIDITY OF A TREATY WHICH UNDERTAKES TO EXER-
CISE A POWER PROHIBITED TO THE FEDERAL GOVERN-
MENT.

Some powers are by the constitution forbidden to the United States expressly—"No title of nobility shall be granted by the United States."¹ Others are forbidden by implication, as by Art. I., § 2, cl. 1, providing: "The House of Representatives shall be composed of members chosen * * * *by the people of the several states.*" Of those expressly forbidden, some are forbidden in general terms, as in Art. VI., § 3, providing: "no religious test shall ever be required as a qualification to any office or public trust under the United States." Others are forbidden specially to one department of the federal government: "*Congress shall make no law respecting an establishment of religion.*" Nothing is, in terms, forbidden to the treaty-making power. Is the treaty-making power then limited by any of these prohibitory provisions. First, as to those powers expressly forbidden in general terms to the federal government. There are several of these. Art. VII., § 3, provides: "* * * No religious test shall ever be required as a qualification to any office or public trust under the United States." Article I., § 9, cl. 7, provides: "No title of nobility shall be granted by the United States;" Art. II., § 3, cl. 2, "No attainder of treason shall work corruption of blood;" Art. V.; "* * * No state, without its consent, shall be deprived of its equal suffrage in the Senate." The second amendment reads: "* * * The right of the people to keep and bear arms shall not be infringed;" amendment

¹ Art. I., § 9, cl. 7.
(588)

three; "No soldier shall, in time of peace, be quartered in any house without the consent of the owner * * *," amendment four; "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. * * *." The fifth amendment provides: "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except * * * nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. * * *." The seventh amendment preserves the right of trial by jury in civil causes; and the eighth reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." The fifteenth amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." The federal government is forbidden to do these things; may the President and Senate by a treaty do them?

But some powers are, in terms, forbidden only to some particular department of the federal government, as Congress. Art. I., § 9, cl. 1, provides that "the migration or importation of such persons (slaves) * * * shall not be prohibited by Congress prior to the year eighteen hundred and eight." Amendment one, that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press. The power to do these things being forbidden, in terms, only to Congress, can they be done by the treaty-making power, or is the treaty-making power limited by them?

Congress can make no laws abridging the freedom of

speech, or of the press. Can the President and Senate make a valid treaty with Germany providing that no newspaper in the United States shall print anything derogatory to the Kaiser or his government? If so, one of two consequences would follow, either the treaty would be valid and effective only when Congress passed the necessary legislation to make it so, or it would be the supreme law of the land without legislation. If the first supposition be correct then since Congress is forbidden in terms by the constitution to make any such law, the treaty would not be a treaty as that term is used in the constitution, for it could never "be the supreme law of the land." That is, the President and Senate cannot make such a treaty. If the second supposition be correct, then the President must, on a breach of the treaty, execute it himself by preferring an indictment against the offender, alleging the crime of breach of the treaty. But this view would give the President and Senate the power by treaty to create criminal offenses and prescribe the punishment therefor, a power which, when it exists at all in the federal government, is vested in Congress, and which has never yet been claimed for the treaty-making power.

Congress was forbidden to prohibit the importation of slaves prior to the year eighteen hundred and eight. This provision was much debated in the constitutional convention and the provision for forbidding the prohibition of importation was strenuously insisted on. So careful were the delegates from some of the states to guard against such prohibition of importation, and so willing were a majority of the states to guarantee the prohibition of importation, that in the article providing for amendments to the constitution, (Art. V.) the only limitation put on amendments was that "no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article," and that no state, without its consent, shall be deprived of its equal suffrage in the Senate. Now, the first clause in the ninth section of the first article is the one forbidding Congress to prohibit the im-

portation of slaves. If then the argument that the treaty power is limited only by general prohibitions and not by limitations imposed, in terms, only on Congress, be sound, it would follow that the framers of the constitution intended to vest in the President and two-thirds of the Senate power to do, by agreement with some petty African chief, that which they not only forbade to the President, a majority of the Senate and a majority of the House, but that which could not even be done by an amendment to the constitution itself though every state then in the union agreed thereto. Such a conclusion, it is submitted, is impossible. If further illustration be necessary to show that no distinction was intended to be made between the rights or powers reserved in terms against Congress and those reserved in general terms, it is furnished by a consideration and comparison of Art. VII., § 3, and the first amendment. Art. VII., § 3, provides: "No religious test shall ever be required as a qualification to any office or public trust under the United States." The prohibition here is *general*. The first amendment states that "*Congress* shall make no law respecting an establishment of religion. * * *" If the treaty power is limited by the former because the prohibition is expressed in general terms, but not by the latter because it appears in terms to be directed against Congress, then we must reach the conclusion that the President and Senate have power to impose a state religion on the people of the United States; but, having done so, they have no power to do the comparatively insignificant thing of requiring of the officers of the government an oath of conformity to that religion.

The first eight amendments, with the exception of the first, embody express restrictions on the power of all departments of the federal government, as distinguished from restrictions on the powers of Congress, and hence are admitted by all to be limitations on the treaty-making power. In these amendments the powers² forbidden are expressly

²In some of these amendments the prohibition of power is ex-

enumerated—"The right of the people to bear arms shall not be infringed;" "no soldier shall in time of peace be quartered in any house without the consent of the owner * * *," etc.

The abuse of certain powers by the mother country was fresh in the minds of the people when these amendments were adopted, and these powers they determined not to surrender to this new government, hence we find them reserving from that government the power to make unreasonable searches and seizures, to issue warrants except upon probable cause, supported by oath, etc. Many of the colonists had fled from an established church, therefore the power to establish a state religion was denied to the federal government. Certain rights had been iterated and reiterated in English history as fundamental to liberty, hence we find the people incorporating in this new Bill of Rights provisions from the English Bill of Rights of 1668, and from the Petition of Right, such are the provisions for the right of petition, the right to bear arms, the prohibition against the quartering of soldiers and against excessive bail, fines and cruel and unusual punishment. It was practically impossible, however, in a constitution, intended to form a general framework of government, to enumerate all that great body

pressed by the use of the correlative term "right," as "the right of the people to keep and bear arms shall not be infringed;" in others the prohibition of power is expressed directly: "No soldier shall, in time of peace, be quartered in any house," etc. The Supreme Court, however, has made no distinction on the language used, but have held that these amendments were limitations on federal power. In *Fox v. Ohio*, 5 How. 434, the court says these amendments "were * * * designed * * * exclusively as restrictions upon the federal power." In *Barron v. Baltimore*, 7 Pet. 243, Marshall, C. J., said: "Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are materially, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

of powers they desired to reserve,⁸ so having set out those that were uppermost in all men's minds at the time, the remainder were reserved in the general language of the ninth and tenth amendments: "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people," and "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." By the comprehensive language of these amendments the people obtained the same result that would have been obtained by enumerating every right and power they had not surrendered in other parts of the constitution.

The powers reserved by the tenth amendment are the correlatives of the rights reserved in the first nine amendments, and are co-extensive with them. Whatever rights the people retained from the federal government, the states or the people by the tenth amendment reserved their original power over as against the federal government. It was decided as early as 1833, and reiterated in subsequent decisions of the Supreme Court, that these nine amendments were restrictions on the powers of the federal government, not on the states; that the states can still "infringe the right of the people to bear arms" or can quarter soldiers in times of peace," or do any of the other things prohibited in the first nine amendments. *Barron v. Baltimore*, 7 Pet., p. 247, per Marshall, C. J.; *Spies v. People* (1887), 123 U. S. 131. It was for this reason that, though the *fifth* amendment provided that no person should "be deprived of life, liberty or property without due process of law," it was necessary, in order to afford the same protection to a person against the action of a state, to provide, as was done in the fourteenth amendment: "Nor shall any *state* deprive any person of life, liberty or property, without due process of law." That is, the powers to do the

⁸ Indeed, those who were opposed to the adoption of any amendments at that time used the argument that in such a constitution there was no place for any enumeration of reserved rights.

enumerated things forbidden to the federal government in the first nine amendments, are powers which, originally inhering in the states, were reserved to the states or to the people.

If the ninth amendment had provided that the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people *from Congress*, and if the tenth amendment had said: The powers not delegated *to Congress* by this constitution, nor prohibited to the states, are reserved to the states respectively, or to the people," the rights and powers reserved by these amendments would come within the class of powers which some have supposed were reserved only from congressional action. Since, however, the ninth amendment reserves the rights generally, and the tenth reads: "The powers not delegated to the *United States*," etc., "are reserved to the states," etc. These rights and powers come within the class forbidden to *all* departments of the federal government. A class of powers which it is admitted by all cannot be exercised by the treaty-making power.

But it is said that since the clause of the constitution vesting the treaty-making power in the President and Senate is unlimited, and the tenth amendment to the constitution does not in terms refer to it, no limitation in favor of the rights reserved by that amendment can be implied.

If this argument is sound then, since there is nothing in that part of the constitution creating the Senate, the House, or the Supreme Court that refers restrictively to the treaty-making power, and that power is on its face unlimited, it may by treaty abolish these departments of the government. There is nothing in the constitutional provision that Senators shall be chosen by the legislature of the respective states (itself a reserved power which the states may or may not exercise as they see fit, but which the federal government cannot deprive them of) that, in terms, limits the treaty-making power. If the argument advanced is sound then this provision is subject to the treaty-power. Since the same is true of the provision that the President shall

be a natural born citizen, that Congress shall have power to regulate interstate and foreign commerce, etc., according to the argument the President and Senate are not limited in making treaties by these provisions. We have seen, however, that all writers agree that these provisions are a limitation on the treaty-making power, though on their face they contain no reference to it and though that power is on its face unlimited. This power, it is admitted, cannot be used to change the Constitution. Is it not so used if it should seek to infringe "the right of the people to keep and bear arms," to quarter soldiers in any house without the consent of the owner, in times of peace; to violate "the right of the people to be secure in their persons, houses, papers and effects;" to hold any person "to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," or subject any person for "the same offence to be twice put in jeopardy of life or limb;" or compel a person "in any criminal case to be a witness against himself; or prevent the accused from enjoying "the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed," all of which things the constitution says the federal government shall not do, but which, by virtue of its reserved powers, the state governments are at perfect liberty to do so far as any restraining power in the federal government is concerned.

Story gives as the reason why the President and Senate cannot make a treaty to change the organization of the government, or annihilate its sovereignty, or to overturn its republican form, that a power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument.

If one or more of the powers given by the states or the people to the federal government in the constitution cannot be destroyed by another power given in the same instrument, it must, *a fortiori*, be true that a power or powers reserved by these same states or people in that instrument, as was done in the tenth amendment, cannot be destroyed by a power given.

The argument drawn from the fact that, because the treaty-making power is, on its face, unlimited, the people intended it to be unlimited with regard to the powers reserved in the tenth amendment, would apply equally to make it unlimited as to the other provisions of the constitution in regard to which all agree with Story in saying it is not unlimited.

If the rights and powers reserved in the ninth and tenth amendments are not reserved against the treaty-making power but only against legislation, then the states and the people have been so foolish as to protect themselves from all *three* departments of the federal government—since the concurrence of the House, the Senate and the President are necessary to legislation—while at the same time surrendering their most vital powers of self-government to *two* of the same three departments of the same government. That is, they really protected themselves from the House of Representatives only, the very department of the government they least need protection against, since normally it is the most responsive to their will. It is submitted that such an intention cannot be imputed to the framers of the constitution.

In connection with the question of the intention of the framers of the constitution, the effect of the view that the tenth amendment is not a limitation on the treaty power is worthy of consideration. In the case of an ordinary treaty, such as a treaty of commerce, if it should appear that the treaty is harmful, it can be rendered of no effect by an act of Congress, passed by two-thirds of the House and Senate, without the concurrence of the President.⁴

If, however, a treaty were made which affected the reserved rights of the states, it is, to say the least, doubtful if such a treaty could be abrogated at all without the consent of the President, for Congress having no power to pass a law, affecting the reserved rights of the states, could

⁴ It has been often held that a subsequent act of Congress inconsistent with a treaty repeals the treaty. *The Cherokee Tobacco*, 11 Wall. 616.

enact no law either in affirmance or derogation of the treaty.

Another result would be that it would be possible by a treaty to confer on aliens in this country greater rights than our own citizens have. In the recent excitement over the Japanese treaty it was claimed by some that the treaty with Japan gave the Japanese, residing in San Francisco, the right to attend the public schools, and that California could pass no law to abridge that right unless the law included all aliens.⁵

Now it has been decided that a state may pass a law requiring negroes to attend separate schools,⁶ on the ground that the power to pass such laws was reserved by the tenth amendment. If the treaty power then is not limited by the tenth amendment aliens can be given greater rights by treaty than our own citizens can ever obtain in their own country.

It is usual to give the citizens of a nation, by treaty, the rights of citizens of the most favored nation, it is not unusual to give them, at least in some particulars, the same rights as the citizens of the country extending the rights; but to ask that they be given greater rights than the citizens of that country are themselves entitled to, smacks of conquest more than of comity.

It has been contended, however, recently, by Mr. Elihu Root,⁷ that the tenth amendment does not limit the treaty-making power, indeed that there are no express limitations on it, and that "there can be no question of state rights, because the Constitution itself, in the most explicit terms, has precluded the existence of any such question." Mr. Root arrives at this conclusion from the fact that the treaty-making power is vested in the federal government, that the states are forbidden to make treaties and that the Constitution provides that treaties shall be the supreme law of

⁵ The treaty having guaranteed Japanese residents the same rights as to residence as were enjoyed by the most favored nation.

⁶ *United States v. Buntin*, 10 Fed. 730.

⁷ 1 Am. Jour. of Int. Law, 273.

the land. Although he does not say categorically, that the treaty-making power is likewise not limited by the first nine amendments, that would seem to be included in his statement: "*Although there are no express limitations* upon the treaty-making power granted to the national government, there are certain implied limitations arising from the nature of our government and from other provisions of the Constitution",⁸ for as has been shown, the powers forbidden to the United States, in the nine amendments, are powers reserved to the states. If, as he admits, there are limitations arising "from the nature of our government" it is difficult to see why there can be no question of state rights, for certainly nothing is more characteristic of the "nature of our government" than the existence of the state rights reserved in the first ten amendments. As he also says that there are limitations arising "from other provisions of the Constitution"—though there are no other provisions expressly limiting the treaty power—it is difficult to see why, since the first ten amendments are "provisions of the Constitution" and, as has been shown, contain as express and as unlimited prohibition against action by the federal government as any other provisions of the Constitution, these amendments—which embody state rights—are not to be included in these "other provisions of the Constitution". The very language of the Supreme Court, in *Geofroy v. Riggs*, which Mr. Root quotes in maintenance of his position, would seem to include the first ten amendments among the provisions of the Constitution which limit the treaty power. Says the Court: "The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument, against the action of *the government or of its departments*".⁹

Certainly the first ten amendments are "restraints which are found in that instrument against the action of the

⁸ P. 279.

⁹ *Italics*; the writer's.

government"; no proposition of constitutional law is more firmly established.¹⁰

If no question of state rights can arise in connection with the treaty-power then the President and the Senate can by a treaty deprive a state of one or both of its Senators; for the right to be represented by two Senators is a state right, a right which a state may relinquish, but which Article V of the Constitution says it shall not be deprived of without its consent.

Mr. Root in his argument¹¹ seems to the writer strangely to misconceive the question. His argument as the writer understands it is this: The question of the reserved powers of the states, as to legislation, may arise because legislative power by the Constitution is distributed; upon some subjects Congress has authority, upon other subjects the state legislature has authority, so the question may arise as to judicial power for the same reason—in some cases the federal courts, and in others the state courts, have jurisdiction; the same thing is true of the executive power, and therefore the question of state rights may arise in relation thereto—"However, the treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation, acting in direct relation to and representative of every citizen in every state"—hence no question of the reserved powers of the states can arise in connection with the exercise of the treaty-making power. This argument indeed proves that the states did not reserve the power to make treaties¹² and hence have no such power even in the exercise of their reserved powers. But it fails to prove that the federal government in the *exercise* of its undoubted treaty-making power is not limited by those restrictions which the first ten amendments have placed on the power of the federal government. It proves that the federal

¹⁰ *Spies v. People*, 123 U. S. 131.

¹¹ The authorities he cites are dealt with later in this article.

¹² Though they may, with the consent of Congress, enter into agreements or compacts with foreign nations.

power to make treaties is *exclusive*, but it does not prove that it is *unlimited*, or that is not limited by the tenth amendment. The present writer has endeavored to show, not that the states reserved a general power to make treaties, but that they did expressly reserve from the action of the federal government, other powers, of which they cannot be deprived by that government, whether it attempts the deprivation by legislative, executive or treaty-making action.

It is said, however, that the question whether the tenth amendment is a limitation on the treaty-making power or not, is no longer an open one since it has been already decided by the Supreme Court of the United States.

The cases cited as authority for this most sweeping and important proposition are *Ware v. Hylton*,¹³ *Fairfax v. Hunter*,¹⁴ *Chirac v. Chirac*,¹⁵ *Orr v. Hodgson*,¹⁶ *Hughes v. Edwards*,¹⁷ *Carneal v. Banks*,¹⁸ and *Hauenstein v. Lynham*.¹⁹

In *Ware v. Hylton*²⁰ it was decided that a law of Virginia, passed in 1777, which provided that any citizen of Virginia, owing money to a subject of Great Britain, might pay the same into the loan office of the state and be discharged of the debts, was abrogated by the treaty of 1783 between the United States and England. This treaty provided that the creditors of either of the contracting parties should meet with no lawful impediment to the recovery of all debts theretofore contracted.

It is submitted that this case is no authority for the broad proposition that the treaty-making power is not limited by the reserved rights of the states. In the first place the treaty in question was entered into by the Continental Con-

¹³ 3 Dall. 199 (1796).

¹⁴ 7 Cranch. 603 (1812).

¹⁵ 2 Wheat. 215 (1817).

¹⁶ 4 Wheat. 453 (1819).

¹⁷ 9 Wheat. 489 (1824).

¹⁸ 10 Wheat. 181 (1825).

¹⁹ 100 U. S. 483 (1879).

²⁰ *Supra*.

gress before the adoption of the present Constitution. Now the method of entering into a treaty under the confederation differed from that under the Constitution. Under the confederation each state was entitled to only one vote in Congress and Congress could make no treaty without the consent of nine states. As there were thirteen states in the Confederation, this meant that the assent of three-fourths of all the states was necessary to the making of a treaty. Under the present Constitution a treaty is not so directly the act of a state, and the assent of three-fourths of the states is not necessary. Each state has two Senators and they may not vote in unison; but, more important is the difference that the Constitution does not require the assent of three-fourths or even of two-thirds of the states to the making of a treaty, but only the assent of two-thirds of the Senators present when the treaty is voted on. It might well be then that greater force should be allowed to a treaty negotiated by the states in the Continental Congress where they acted much as independent states in a league, than under the present Constitution where the vote on treaties is not by states at all.²¹ The position of the states in the Confederation seems to be referred to by Wilson, J. where he says (p. 281): "The state made the law; the state was a party to the making of the treaty; a law does nothing more than express the will of a nation; a treaty does the same."

Again the decision in *Ware v. Hylton* that a treaty overrides a state law confiscating debts due foreigners is not a decision that the treaty-making power under the Constitution can be used to deprive a state of any of its reserved

²¹ This difference is shown by a comparison of the wording of treaties under the Confederation and under the Constitution. The treaty of 1778 with France stated the contracting parties to be "The Most Christian King and the United States of North America, to wit: New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia." The treaty of 1800 commences: "The Premier Consul of the French Republic in the name of the people of France, and the President of the United States of America, equally desirous," etc.

rights; for while this right of confiscation did exist in Virginia before the present Constitution it was not only not reserved, but is expressly surrendered by the Constitution—in that section providing that no state shall pass any law impairing the obligations of a contract.

Indeed, the very reason the states were so careful to insist on an expression of their reserved rights, in framing the present Constitution, was because, by the new Constitution, they had in general created a more centralized government than existed under the Confederation.

What the case really decides is that any treaty made under the Articles of Confederation and which was valid under the Articles of Confederation, was valid by adoption after the Constitution was adopted.

In *Fairfax v. Hunter*, decided in 1812, Justice Story did indeed say that the treaty of 1794 would have the effect of rendering void the title to land claimed under an act of the legislature of Virginia. All that he said on this point however,—and it is comprised in a few lines of a long opinion,—is dictum, for he had already shown, in ten pages of his opinion, that the acts of the legislature did not, in fact, vest any title to the land in the claimant. The question of the power of the President and Senate to make such a treaty was not argued in this case.

In the case of *Chirac v. Chirac*, the Supreme Court held, that the treaty of 1800 between the United States and France, concerning the devolution of real estate, abrogated a law of Maryland inconsistent with the treaty. The question of the power of the federal government to make such a treaty was not argued by counsel or discussed by the court.

In *Orr v. Hodgson* it was again held, that the treaty of 1783, between England and the United States, overruled a law of Virginia as to the incapacity of aliens to inherit land.

Here again the treaty in question was a treaty negotiated by the Continental Congress, not by the Senate and the President. And again the power of Congress, or of the

President and Senate to make such treaty, does not appear to have been argued by counsel, nor was it discussed by the court.²²

In *Hughes v. Edwards*, involving a similar question of the right of an alien to own lands, the court merely follows *Harden v. Fisher* [which, in fact, was decided *against* the claimant under the treaty, on the ground, however, that the claimant had not brought himself within the terms of the treaty] and *Orr v. Hodgson*. Again the question of power was not argued by counsel or examined by court.

Carneal v. Banks likewise was a question concerning lands. Alienage was pleaded. While the Court says that the treaty of 1778 would give an alien the right to hold land in Kentucky, this is mere dictum, for the court says there was no proof that the alleged owner (through whom one of the parties claimed) was an alien. And the case is decided on a different point, viz: that the trial court erred in giving a judgment based on a misdescription of the land in controversy when there was no allegation of such misdescription in the pleadings.

Hauenstein v. Lynham is the latest case relied on to show that the treaty-making power is not limited by the reserved rights of the states. This case involved the single question of the right of an alien to the proceeds of land in Virginia which had been sold under an inquisition of escheat. The alien claimed by virtue of a treaty between the United States and Switzerland. The Court of Appeals of Virginia gave judgment in favor of the escheator, on the ground that the treaty did not *purport* to give the alien the right claimed by him. While expressing a doubt as to the power of the federal government to make a treaty concerning land in a state, the court said "* * * we do not express any opin-

²² Story, J., says: "This subject has been heretofore before us, and although no opinion was then pronounced, it was most deliberately considered. We do not now profess to go at large into the reasoning upon which our present opinion is founded. It would require more leisure than is consistent with other imperious duties." This language does not apply to the question of the power of the federal government to make such treaties, but to the meaning of the language used in the treaty, as appears by the context.

ion on this question in this case, because it is not necessary to do so".²³

On appeal the judgment was reversed by the Supreme Court of the United States. The court held that the treaty, properly construed, did give the plaintiff the right claimed by him, and that the federal government was competent to make such treaty. The court cited *Ware v. Hylton*, *Chirac v. Chirac*, *Carneal v. Banks*, *Hughes v. Edwards* and *Orr v. Hodgson*. Strangely enough, though the Court of Appeals of Virginia had expressed serious doubts whether the federal government possessed the power to make the treaty involved, the counsel for the defendant did not argue that question before the Supreme Court. Swayne, J., says: "In the able argument before us, it was insisted upon on one side, and not denied on the other, that, if the treaty applies, its efficacy must necessarily be complete. The only point of contention was one of construction."²⁴

These cases are the ones relied on—and they are the strongest for the purpose—to prove the general proposition that the reserved rights of the states are subject to the treaty-making power. Of these seven cases two, viz: *Ware v. Hylton* and *Orr v. Hodgson*, are decisions on treaties made by the Continental Congress, and treaties so made may for the reasons given above be distinguished from treaties made by the President and Senate. Two of the remaining five, viz: *Fairfax v. Hunter*, and *Carneal v. Banks*, are of no authority whatever on the question under discussion for they were decided on a point other than the effect of a treaty. *Chirac v. Chirac*, *Hughes v. Edwards* and *Hauenstein v. Lynham*, remain. Of these the second merely following *Orr v. Hodgson*, and a dictum, in *Harden v. Fisher*, decided that a treaty giving aliens the right to own lands, overrode a state law forbidding such ownership. The first decided that a treaty enabling an alien to inherit land abrogated a state law containing conflicting provisions, and the

²³ *Hauenstein v. Lynham*, 28 Gratt. p. 72.

²⁴ At p. 490. *Italics*; the present writer's.

last decided that a treaty enabling an alien to withdraw the proceeds of land, which land he was not entitled to hold under the law of the state where the land was situated, was supreme over the law of the state which denied him such right. In none of these cases does it appear that the question of the power of the federal government to make such treaties was argued.²⁵

Admitting that the right to prescribe who shall own real estate in a state, and the right to forbid aliens to sell real estate and enjoy the proceeds are, generally speaking, among the reserved rights of the states, and that these cases establish that the federal government may, by treaty, override state laws on these two subjects,²⁶ do these cases prove the general proposition that *all* the reserved rights of the states are subject to the treaty power? or, in the language of Mr. Root, that "so far as the real exercise of the power goes, there can be no question of state rights." If these cases stood alone, or had generally been regarded as establishing this broad doctrine, then, however dangerous this treaty-making power might seem—and the thousand and one measures of local government now classed under the police power of the states would lie prostrate before it—or however far such surrender of power was from the minds of the framers of the Constitution, it might be admitted, even though the doctrine had been promulgated without adequate argument, that the question was no longer open. Such, however, is far from the fact. In the very case of *Hauenstein v. Lynham* the court was careful to point out that it was laying down no

²⁵ Whether counsel opposing the rights claimed under the treaties were so confident that the treaty, even if a valid exercise of power, did not apply to the case in hand, that they did not think it worth while to deny the power, or whether they had no doubt of the power of the federal government and therefore confined themselves to the question of the application of the treaty, of course, does not appear.

²⁶ Even if the same effect were given to treaties made by the Continental Congress, as to treaties made under the constitution. *Ware v. Hylton* would be obsolete now, because the confiscation attempted by the state law in that case is now expressly forbidden to the states by the federal constitution. Art. I, § 10.

general doctrine. Says the court: "The only point of contention was one of construction. There are doubtless limitations of this power as there are of all others arising under such instruments; but this is not the proper occasion to consider the subject. It is not the habit of this court, in dealing with constitutional questions, to go beyond the limits of what is required by the exigencies of the case in hand. What we have said is sufficient for the purposes of this opinion."

That the cases above considered, from *Ware v. Hylton* to *Carneal v. Banks*, were not regarded by the Supreme Court, itself, as authority for the general proposition—that the treaty-power could be used to deprive the states of their reserved rights, is made clear by the utterances of the judges of that court in subsequent cases.

Carneal v. Banks was decided in 1825. In 1840, in *Holmes v. Jennison*,²⁷ Mr. Justice Baldwin, discussing the grant of the treaty-making power, says: "Every state has acknowledged power to pass, and enforce quarantine, health and inspection laws to prevent the introduction of disease, pestilence, or unwholesome provisions; such laws interfere with no powers of Congress or treaty stipulations; they relate to internal police, and are subjects of domestic regulation within each state, over which no authority can be exercised by any power under the Constitution, save by requiring the consent of Congress to the imposition of duties on exports or imports, and their payment into the treasury of the United States." And on page 619: "Whenever internal police is the object, the power is excepted from every grant and reserved to the states."

In 1847 the question of the power of a state to pass a law conflicting with a treaty was before the Supreme Court of the United States in the *License Cases*.²⁸

In these cases certain laws of Massachusetts, Rhode Island and New Hampshire, requiring a license to sell liquor

²⁷ 14 Pet. 616.

²⁸ 5 How. 504.

were attacked, on the ground, *inter alia*, of being in conflict with certain treaties made between the United States and France and Holland.

There is nothing in the opinion, of any of the judges who delivered opinions in this case, to show that they considered the question of the treaty-making power as affecting the reserved rights of the states, or of the people, as settled by the previous cases. On the contrary, those cases were not relied on by the eminent counsel, Messrs. Webster, Choate and Hallett, who argued for the supremacy of the treaties, nor referred to by the judges. The judgment of the court was unanimous in upholding the validity of the state laws. Six judges delivered opinions. Three of these did not discuss the question of the effect of the treaties. Three did, and though they thought the treaty did not apply, they each held that even if it were applicable, it would be ineffectual, as being beyond the power of the federal government. Daniel, J., says: "A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a state or of any citizen of a state."⁸⁹

Woodbury, J., says: "Call them by whatever name, if they are necessary to the well being and independence of all communities, they remain among the reserved rights of the states, no express grant of them to the general government having been either proper, or apparently embraced in the Constitution."⁹⁰

Grier, J., says: "The powers which relate to merely municipal regulations or what may more properly be called internal police, are not surrendered by the state."⁹¹

McLean, J., discussing the general division of power between the federal and state governments, says: "A state regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal mat-

⁸⁹ P. 613.

⁹⁰ P. 627.

⁹¹ P. 631.

ters which relate to its moral and political welfare. Over these subjects the federal government has no power."⁵⁸

No dissent from these views is expressed by any of the other judges, but there is much in the general discussion by those judges of the relative powers of the federal and state governments to show that they entertained the same views. It would seem plain from this case that whatever else may have been thought of the cases of *Ware v. Hylton*, *Fairfax v. Hunter*, *Chirac v. Chirac*, *Orr v. Hodgson*, *Hughes v. Edwards* and *Carneal v. Banks*, they were not regarded, either by the bar or the bench, as authority for the general doctrine they are now said to establish and affirm.

Two years later the *Passenger Cases*⁵⁹ came before the Supreme Court. In these cases acts of the legislatures of New York and Massachusetts were attacked on the ground, *inter alia*, (1) that they were unconstitutional, as attempts to regulate foreign commerce; and (2) that they were void because in conflict with certain treaties made between the United States and England.

Five of the nine judges who decided these cases decided that the state statutes were void as attempts to regulate commerce. The other four judges held the acts constitutional. The majority having disposed of the cases on this ground, it was unnecessary for them to decide whether the acts were in conflict with the treaties, and if so, whether they would be void also for that reason or not. Two of this majority, McLean and McKinley, do not express any opinion on this point. The other three, Wayne, Catron and Grier, discuss the question whether, admitting that the state laws were in conflict with the treaty, they would nevertheless be valid as an exercise of the reserved police power of the states. They held that the acts in question were regulations of commerce and therefore were an attempted exercise of a power vested in the federal government, and not an exercise of the police power which the states had re-

⁵⁸ P. 588.

⁵⁹ 7 How. 283.

served. But it is clear, from the opinions of these three judges, that they considered that the rights reserved to the states, by the tenth amendment, were not subject to the treaty-making power.³⁴

All of the four dissenting judges put themselves on record as of the opinion that the reserved rights of the states are not subject to infringement by the treaty-making power; and that any treaty violating these rights is void. Daniel, J., says: (506-507.) "The law of New York has been, further assailed in argument as being an infraction of the fourteenth article of the treaty of amity and commerce negoti-

³⁴ Wayne, J., in discussing the exclusiveness of the power of the federal government to regulate commerce places such regulation by treaty and by Congress on the same footing, and gives the federal government no more power under the treaty clause than under the commerce clause. At the same time he admits that Congress has no power to interfere with the reserved rights of the states, even though they effect commerce. He says (p. 418): "It seems to me, when such regulations of commerce as may be made by *treaty* are considered in connection with that clause in the constitution giving to *Congress* the power to regulate it by legislation, and also in connection with the restraints upon the states in the tenth section of the first article of the constitution, in respect to treaties and commerce, that the states have parted with all power over *commerce, except the regulation of their internal trade.*" The remainder of his opinion shows he does not consider that the states gave to the federal government any greater power in commercial matters under the treaty section than under the clause giving to Congress the power to regulate commerce. In answering the argument that these state statutes were valid as within the police power of the states, he never hints at the answer that would be the obvious one if he believed that the police powers were subject to the treaty power, viz: that, admitting that these statutes were made in the exercise of the police power, they were void because in conflict with existing treaties; but on the contrary, admits that under the police power many rights are reserved to the states. On page 425 he says: "The states have also reserved the police right to turn off from their territories paupers, vagabonds, and fugitives from justice. But they have not reserved the use of taxation universally as the means to accomplish that object, as they had it before they became the United States. Having surrendered to the United States the sovereign police powers over commerce, to be exercised by Congress or the treaty-making power, it is necessarily a part of the power of the United States to determine who shall come to and reside in the United States for the purposes of trade, independently of every other condition of admittance which the states may attempt to impose upon such persons. When it is done in *either* way, the United States, of course, subject the foreigner to the laws of the United States, and *cannot exempt him from the internal power of police* of the states in any particular in which it is not constitutionally in conflict with the laws of the United States."

ated between Great Britain and the United States * * * and the second clause of the sixth article of the Constitution, having declared the Constitution and laws of the United states, made in pursuance thereof, and treaties made under the authority of the United States, to be the supreme law of the land, the laws of New York, being in derogation of the fourteenth article of the treaty of 1794, are unconstitutional and void * * *. Admitting this fourteenth article of the treaty to be in full force, and that it purported to take from the state of New York the right to tax aliens coming and commorant within her territory, it would be certainly incompetent for such a purpose, because there is not, and never could have been, any right in any other agent than her own government to bind her by such a stipulation."

Taney, C. J., speaks in equally unequivocal language; he says⁵⁵ "If the people of the several states of this Union reserved to themselves [as he elsewhere holds they did] the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the state, would be an usurpation of power which this court could neither recognize nor enforce." Nelson, J., assents to the conclusion, and on the reasoning of Taney.⁵⁶

Justice Woodbury thought that the state laws did not conflict with the provisions of the treaty since none of these provisions "profess to exempt their people or their property from state taxation after they arrive here." "But," he adds, "If such a stipulation were made by the general government it would be difficult to maintain the doctrine that by an ordinary treaty it has power to restrict the rights and powers of the several states any further than the states have by the constitution authorized, and that this has ever

⁵⁵ P. 466.

⁵⁶ P. 518.

been authorized." From this case it appears that seven out of nine judges of the supreme court (the other two expressing no opinion whatever) considered it beyond question that the tenth amendment was a limitation on the treaty-making power, and that they not only did not consider that the cases from *Ware v. Hylton* to *Carneal v. Banks* established the general doctrine now claimed for them, but that on the contrary that they considered such a doctrine untenable.

Forty years after the dictum of Story, J., in *Fairfax v. Hunter*, a dictum of Chief Justice Taney in delivering the opinion of the court in *Prevost v. Greneaux*,¹⁹ shows that the court at that time not only did not consider that the broad doctrine that the people had relinquished all power over their domestic concerns to the treaty-making power, had been settled by *Ware v. Hylton*, but seems to indicate that even the narrow point actually decided in that case, viz., that the treaty power could divest a vested right, was not considered as settled by that case. The Chief Justice said:²⁰ " * * * A treaty subsequently made by the United States with France could not divest rights of property already vested in the state, even if the words of the treaty had imported such an intention." He decides, however, that the words of the treaty did not apply to the case before the court.

As doubt was thrown on the case of *Ware v. Hylton* in *Prevost v. Greneaux*, so three years later it appears by another dictum in *Frederickson v. Louisiana*,²¹ that the court likewise does not regard the actual points decided in *Chirac v. Chirac*, *Orr v. Hodgson*, and *Hughes v. Edwards*, as settled by those cases. Those cases involved a similar question to the case at bar, and the court said in discussing that question: "It has been suggested in the argument of this case, that the government of the United States is incompetent to regulate testamentary dispositions or laws of in-

¹⁹ 19 How. 1 (1856).

²⁰ P. 7.

²¹ 23 How. 445 (1859).

heritance of foreigners, in reference to property within the states. The question is one of great magnitude, but it is not important in the decision of this cause,⁴⁰ and we consequently abstain from entering upon its consideration."⁴¹

From this review of the cases in the Supreme Court of the United States subsequent to *Carneal v. Banks* and prior to *Hauenstein v. Lynham*, it is submitted that not only did the justices of that court not regard those cases as establishing the broad doctrine that the treaty-making power was supreme over the reserved rights of the states, but that on the contrary most of them considered it beyond question that those reserved rights were exempt from interference by the treaty-making power. It has been pointed out that in *Hauenstein v. Lynham* the court was careful to say that its decision was intended to be confined to the facts of the case before it. The court said: "There are doubtless limitations of this power as there are of all others arising under such instruments; but this is not the proper occasion to consider the subject." Field, J., concurred in the opinion in *Hauenstein v. Lynham*, and yet three years later, when sitting in the Circuit Court, we find him saying in *In re Quong Woo*:⁴² "The petitioner is an alien, and under the treaty with China * * * he has, under the pledge of the nation, the right to remain, and follow any of the lawful ordinary trades and pursuits of life, without let or hindrance from the state, or any of its subordinate municipal bodies, *except* such as may arise from the enforcement of equal and impartial laws."

⁴⁰ Because the court held that the plaintiff had not brought himself within the terms of the treaty.

⁴¹ P. 448.

In *U. S. v. Fox*, 94 U. S. 315 (1876), a case involving the validity of a devise to the United States, Field, J., says, speaking for the court: "The title and modes of disposition of real property within the state, whether inter-vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the federal government was created, and would seriously embarrass the landed interests of the state." The court held the devise void as forbidden by the state statutes.

⁴² 13 Fed. p. 233 (1882).

Hauenstein v. Lynham was decided in 1879.⁴³ In 1880, Sawyer, J., said in a case⁴⁴ in which it was contended that a law of California requiring the payment of a fee for leave to disinter a dead body was void, as in conflict with our treaty with China. "It may well be questioned whether the treaty-making power would extend to the protection of practices, under the guise of religious sentiment, deleterious to the public health or morals, or to a subject-matter within the acknowledged police power of the state."

As late as 1893 Simonton, District Judge, does not conceive of the cases beginning with *Ware v. Hylton* and ending with *Hauenstein v. Lynham* as having established the doctrine of the supremacy of the treaty-making power over the reserved powers of the states. He says:⁴⁵ "The police power is a right reserved by the states, and has not been delegated to the general government. In its lawful exercise the states are absolutely sovereign. Such exercise cannot be affected by any treaty stipulations." It appears then that the Supreme Court has in three cases, *Chirac v. Chirac*, *Hughes v. Edwards* and *Hauenstein v. Lynham*, decided that a treaty made under the constitution enabling aliens to inherit or sell lands in a state of the Union, is supreme over a state law containing provisions conflicting with the treaty; that in these cases the question of the power of the federal government was not argued by counsel nor discussed by the court; that no general principles were laid down by the court from which it can be argued that the court thought that either the rights categorically reserved in the first nine amendments, or those reserved in general language in the ninth and tenth amendments, were subject to the treaty-making power, but, that on the contrary, in the last case, the court was careful to limit their decision to the exact point before the court. It further appears that in every case that has come before the Supreme Court where reserved rights other than those involved in

⁴³ *In re Wong Yung Quy*, 2 Fed. 624 (1880).

⁴⁴ *Cantini v. Tillman*, 54 Fed., p. 976.

Chirac v. Chirac, *Hughes v. Edwards*, and *Hauenstein v. Lynham*, those judges who have discussed the question have either expressly denied, or have questioned, the power of the federal government by treaty to infringe the reserved rights of the states; and that in discussing the question neither the judges nor counsel have cited *Chirac v. Chirac*, *Hughes v. Edwards*, or *Hauenstein v. Lynham*, as authority for the doctrine that the reserved rights of the states were subject to the treaty-making power. It also appears that while all of the judges who sat in *Holmes v. Jennison*, the *License Cases* and the *Passenger Cases*, did not, in any one of those cases, hold that the reserved rights of the states were exempt from the treaty-making power,⁴⁰ yet all of the nine judges, who sat in those cases, did in one of the three hold that the reserved rights were exempt. It is, therefore, submitted, in view of these facts, that the doctrine that the treaty-power is supreme over the reserved rights of the states is by no means established in our jurisprudence.

The issue has been much obscured by the specious plea that it is intolerable that a state should enact laws in conflict with a treaty and by taking away rights guaranteed to foreigners, under such treaty, give just cause of offense to a foreign nation, and even possibly imperil the peace of the whole union. It would seem that if blame is to be awarded it should be visited on the federal government which, having no right to make a treaty interfering with the right of a state to enact laws under its reserved powers, attempts nevertheless to do so. Nor is much sympathy to be wasted on the foreign nation with whom the treaty has been negotiated, when it finds the treaty is of no effect in that regard; it is a perfectly well-established rule of international law that every nation in making a treaty is bound to take notice of the limitations on the power of the other contracting party. If we chose to make a commercial or arbitration treaty with England which does not provide in terms that

⁴⁰ Since some did not think that question necessarily involved.

the treaty is subject to the approval of parliament, or a commercial treaty with Spain, before approving legislation had actually been passed, we would have no legal cause of complaint against England if parliament should refuse to pass laws making the treaty effective, or if the Spanish courts should declare the treaty waste paper; for we are presumed to know that such sanction is necessary to make the treaty effective.⁴⁶

So Japan in entering into a treaty with the federal government by which her citizens in California are given the right to attend the public schools of California, is presumed to know that the power to say who shall attend the public schools of that state is a power reserved to the state and not vested in the federal government. It is no more unjust to require foreign nations to know that the federal government cannot barter away the rights of the states than to require them to take notice of the fact that the most solemn treaty can be rendered of no effect, without any notice to such country, by an act of Congress. Yet such is our law, and Congress has more than once taken such action.⁴⁷

It is sometimes said that foreign nations would not make treaties with us if they were subject to state laws. The fact is otherwise. From the days of the Articles of Confederation to the present time our treaties have contained stipulations recognizing state laws and making the rights of foreigners dependent on such laws. In the treaty of 1783 with Great Britain, Art. V. provides: "It is agreed that the Congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights and properties which have been confiscated, belonging to real British subjects." In the treaty of 1853 with France it was provided in section seven: "As to the states of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to

⁴⁶ II Anson Law and Custom of the Const., 297. Crandall, 205.

⁴⁷ *Taylor v. Morton*, 2 Curtis, 454; *Whitney v. Robinson*, 124 U. S. 190. The first treaty ratified after the present constitution was adopted, the treaty of 1788 with France was annulled by Congress in 1798.

recommend to them the passage of such laws as may be necessary for the purpose of conferring this right." The fifth article of the treaty of 1850 with Switzerland provides: "The foregoing provisions shall be applicable to real estate situated within the states of the American Union, or within the Cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate." These treaties are still in force.⁴⁸

So far we have left out of sight clause two, of section ten, of article one, of the Constitution. This clause provides: "No state shall, without the consent of Congress, enter into any agreement or compact with another State or with a foreign power * * *."

It is still possible then under the constitution for a single state to enter into foreign relations, and conclude a compact or agreement with a foreign nation, provided it have the consent, not of the treaty-making power of the federal government, but of Congress. The distinction between an "agreement or compact" which a state may enter into with the consent of Congress, and a "treaty, alliance or confederation" which is absolutely forbidden to a state, is nowhere explained in the constitution. Nor do the corresponding provisions in the Articles of Confederation throw much light on the subject.⁴⁹

⁴⁸ See Compilation of Treaties in Force, 1904.

⁴⁹ One clause in the Articles provided: "No state, without the consent of the United States, in Congress assembled, shall enter into any conference, agreement, or treaty with any king, prince, or state." Another clause read: "No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, &c., specifying accurately the purposes for which the same is to be entered into, and how long it shall continue." It is held in *Green v. Biddle*, 8 Wheat. 1 (1823), that the consent of Congress may be given after the compact or agreement is made; and in *Virginia v. Tennessee*, 148 U. S. 503 (1892), that such consent need not be expressed, but may be implied from subsequent legislation recognizing the agreement. In *Holmes v. Jennison*, 24 Pet. 540 (1840) four of the judges thought the term "agreement" was used in the constitution in its widest signification, and that even a verbal understanding between a state and a foreign power required the assent of Congress. In *Virginia v. Tennessee*, 148 U. S. 503 (1892), it was held that the terms "compact" or "agreement" did not apply to every possible compact or agreement between one state and another.

If the states in entering into the Union had reserved no powers to themselves, but surrendered them all to the federal government, such a reservation of the power to enter into agreements, even with the consent of Congress would have been an anomaly. They did not, however, surrender all power, but reserved a large portion thereof to themselves, hence it was perfectly natural that since they had retained certain powers they should retain the right to enter into agreements with foreign nations in regard to such powers.

If the states, in vesting the treaty-making power in the federal government, had intended to surrender to the treaty-making power all the powers they had reserved against the other departments of the federal government, why should they expressly retain the power to make agreements with foreign countries? If they, in giving the general treaty-making power to the President and Senate, intended to make that power supreme over all their own powers and rights which they had reserved against the executive, legislative and judicial branches of the government, what was left to them concerning which they could enter into any agreement or compact with a foreign nation?

Plainly they could not enter into an agreement concerning those matters which we may call national, of which they had absolutely divested themselves in favor of Congress, the federal judiciary, or the President; what then was left to them to make agreements concerning? Why, the powers they had not surrendered, but had reserved to themselves. But if they had not as against the treaty-making power of the federal government reserved any powers to themselves, there was nothing left to them about which to make agreements. And the question still recurs, did they then reserve a power to make agreements and at the same time strip themselves of that power by not reserving any rights over which they could exercise the power reserved?

The inevitable conclusion would seem to be that the so-called "reserved rights" were reserved against action by the treaty-making power as well as against the other depart-

ments of the federal government, and that agreements or compacts in relation to these reserved rights can be made only by the joint action of the states and Congress.

The only alternative is to say that the power to make treaties by the federal government and the power to make agreements by the states is concurrent. This theory, in regard to the power of the states and Congress, over interstate and foreign commerce, has been held by the Supreme Court. In the latter case, where the question is which of two distinct parties—a state and the federal government—possess a power, the concurrent theory is tenable. In the case of agreements and treaties likewise, it would be tenable if the question were merely between the states on the one hand and the federal government on the other, *i. e.*, if the states had the power to make agreements without the consent of Congress. Since, however, these agreements require the consent of Congress—the House, the Senate, and the President—⁸⁰ it is a question not of a concurrent power between two governments, or even of a concurrent power between two distinct departments of the same government—which under our theory of the separation of powers it is believed does not exist—but it is a question of a power to be exercised concurrently by the President and two-thirds of the Senate and by the same President, a majority of the same Senate, a majority of the House and the legislature of a state.

Other evidence that these powers are not concurrent is the fact that a treaty absolutely requires the consent of the President; the House has no voice in it, and the unanimous vote of the Senate is not sufficient. An agreement between a state and a foreign power, however, does not require the consent of the President. It will be effective if passed by two-thirds of the House and Senate over the veto of the President.

⁸⁰ Art. I, § 7, of the constitution, provides: "Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary * * * shall be presented to the President of the United States; and, before the same shall take effect, shall be approved by him * * *."

It is submitted that the theory of concurrent powers has no place in a case such as that under discussion.

If the foregoing arguments be sound it would seem that the only reasonable conclusion is that the states and the people in reserving to themselves the powers and rights specifically set out in the first eight amendments, and comprehended in general language in the ninth and tenth, intended to reserve them not only against Congress, which all admit, and which is the most responsive to their immediate will, but against the President and Senate as well, who, while less responsive to the wishes of the people, were chosen as the repository of this power largely because they could act with secrecy and dispatch.⁵¹

The question whether by the reservation of the power to make agreements, with the consent of Congress, the states intended to deprive the federal government of the power to make treaties concerning their reserved rights, has never been raised in the courts. In *Virginia v. Tennessee*,⁵² however, the court, speaking through Mr. Justice Field, in contrasting the federal power to make treaties and the power of the states to make agreements, enumerates as properly falling within the latter power, those things which are among the reserved rights of the states. After saying that a state might enter into an agreement with another state, even without the consent of Congress, to purchase land within its domain belonging to the other state, or to transport goods over a canal owned by such other state, or to drain a malarious district on the border line of the two states, or to provide means to prevent an invasion of pestilence; he proceeds: "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident the

⁵¹ Washington's Message to H. of R., March 30, 1796, quoted in Butler, Treaty-Making Power, 428, n.

Rule xxxvi, clause 3 of the standing rules of the Senate provides: "All treaties which may be laid before the Senate, and all remarks, votes and proceedings thereon shall also be kept secret, until the Senate shall by their resolution, take off the injunction of secrecy, or unless the same shall be considered in open Executive session." Crandall, 75.

⁵² 148 U. S. at page 519.

prohibition is directed to the formation of any combination tending to increase the political power in the states, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries (§ 1403), referring to a previous part of the same section of the constitution in which the clause in question appears, observes that this language "may be more plausibly interpreted from the terms used, 'treaty, alliance, or confederation,' and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character, such as treaties of alliance for purposes of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;" and that "the latter clause, 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other." And he adds: "In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compacts or agreement might be attended with permanent inconvenience or public mischief."

Arguments for the supremacy of the treaty-making power over the reserved rights of the states, founded on the necessity for such power in case of a disastrous war need not be considered. It is an old maxim that "*inter armes leges silent*." The maxim is that the laws are "silent," however, not non-existent. It may be found necessary to take action in the prosecution of a war which cannot be justified on constitutional grounds, as was done certainly on one side or the other in our late civil war, but that does not make the action taken constitutional. The argument proves too

much, for the same necessity may exist for changing our present framework of government, or for abolishing the constitution itself, yet it would not be claimed that the treaty-making power has this extent, normally.

If the argument from necessity is permissible it could be proven that the power of Congress likewise has no limitations or that the treaty-making power rests in a majority of the states in arms, not in the President and two-thirds of the Senate, where the constitution places it.

By the English constitution the rights of a British subject cannot be ceded or extinguished by the treaty-making power without the sanction of parliament.⁵³

By Art. LXVIII. of the Belgian constitution a treaty that binds Belgians individually is not effective without the assent of the chambers.⁵⁴

Art. LIX. of the constitution of the Netherlands provides that treaties that contain any provision concerning legal rights may be ratified by the King only after the approval of the States-General.⁵⁵

In Austria the consent of the Reichsrath is necessary to a treaty imposing obligations on individual subjects.⁵⁶

The King of Spain must be authorized by a special law before he can make a treaty that may be binding individually on Spaniards.⁵⁷

The rights reserved by the tenth amendment are usually spoken of as the reserved rights of the states, but they are more than that, they are the reserved rights of the people as well. The amendment reads, "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, *or to the people.*" The reserved rights of the states are valuable because they secure local self-government to the people, and, with the limitations prescribed by the state constitution

⁵³ See Crandall, 159.

⁵⁴ Crandall, 187.

⁵⁵ Crandall, 190.

⁵⁶ Crandall, 200.

⁵⁷ Crandall, 205.

against the action of the state government, secure to the citizens the enjoyment of certain rights which the Anglo-Saxon has always held dear. If these rights are not secure from the treaty-making power, then since a constitutional treaty is superior to a state constitution, the most sacred rights of the people, those they have forbidden Congress, the courts, national and state, and their own legislatures to infringe, are at the mercy of the President and two-thirds of a quorum of the Senate. If this is true then the citizen, of the United States, with all his boasted constitutions, and checks and balances, is less well protected in his fundamental rights than the citizens of most of the monarchies of Europe."⁸

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⁸ In view of the fact that this article parallels in some degree an article on the same general subject written by Mr. Charles P. Anderson, and published in vol. i, pt. 2 of the "American Journal of International Law," it seems proper to say that the present writer was unaware of the existence of Mr. Anderson's article until after the present article was in type. It may also be added that the conclusions reached in the present article differ radically from the views expressed by Mr. Anderson.

D. FLORENCE ALLEN--TREATY AS LEGISLATION

THE TREATY AS AN
INSTRUMENT OF
LEGISLATION

BY

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PREFACE

World-wide demand after World War I that law be substituted for war called attention to the lack of substantive international law. By a cumbersome but more or less effectual method the lack of a legislative body was to some extent supplied. Multilateral treaties, such as the Locarno Pact and the Kellogg-Briand Pact for the Renunciation of War, have legislative character, and they constitute, as Judge Manley Hudson terms it, "conventional legislation." These and similar treaties possess legislative characteristics, as they declare rules of conduct for the signatory nations which are to be enforced for an indefinite period.

The device of legislating through treaty has come to be employed in increasing measure. Intricate problems, not only of international scope but of domestic character, such as local agriculture, labor and management, education and family life, are involved in treaties which the nations are asked to approve. Almost no phase of human life escapes regulation by the treaties proposed.

When the United Nations was formed, it was contemplated that it should be a body of nations cooperating to establish world peace but that it should not

be endowed with the authority to enact law. This was a power which no nation intended to yield to a world organization. Because of this, the United Nations possesses organs with certain limited executive powers, such as a Security Council and a Secretariat, and also a court; but it has no legislature. For the same reasons the League of Nations had organs with certain executive powers, a Council and a Secretariat, and also a court; but it had no legislature. The Assembly of neither organization was given true legislative functions.

Since in the United States the treaty, when duly ratified and in force, under our Constitution becomes the supreme law of the land, the treaty process presents special problems for the United States. It is urgent to consider now some of the critical questions raised by the increasing use of the treaty as a substitute for domestic legislation. Certain of the proposed treaties, such as the Draft Covenant on Human Rights and various conventions urged by the ILO for ratification, in some respects clearly encroach upon the domestic jurisdiction of the nations. This violates the spirit of Article 2, paragraph 7, of the Charter of the United Nations and also makes an improper use of the treaty process, which should be employed only in matters of international concern. Certain of these treaties, if ratified and effective, for the nations which ratify may curtail national independence in the do-

mestic field to such a degree that eventually the harmony and peace of the world will be effected.

Some of these proposed drafts, at least in part, if ratified will not be true treaties in the accepted sense of the term. They will not be treaties as the term was used by our forefathers who drafted and enacted the provision of the United States Constitution making treaties the supreme law of the land. Our forefathers would understand the need for treaties which curtail the sovereign powers of nations with reference to international affairs; for instance, treaties which abolish the right to make war. They would not have understood innumerable presently proposed treaties which deal with essentially domestic questions. These treaties do not deal with such matters as boundaries, international fishing rights, maritime questions, international trade in narcotics and international traffic in women and children, treaties of peace, cessions of property, and adjustments of post-war problems. These particular treaties, as later shown, require the individual ratifying country actually to change domestic laws and economic processes long established and developed by the particular genius of the particular state.

Treaties which deal with matters essentially domestic in character present harsh alternatives to governments asked to ratify them. To refuse to enact such treaties is to seem to be unwilling to cooperate in solving the world's problems. To ratify them may mean

sary or advisable, could refuse to enact the legislation. This, at present, cannot be done because the self-executing treaty automatically is law in the United States.

(2) The International Court of Justice might construe Article II, Section 7 of the Charter of the United Nations, which withholds from the international organization power to interfere with the domestic jurisdiction of the nations. The court might define the scope and meaning of the phrase "domestic jurisdiction." It is conceivable that the International Court of Justice might hold that proposals framed as treaties which directly operate on permanent residents of a country, with reference to acts done wholly within that country, are not treaties, but are domestic legislation offered under the guise of treaties and are not within the power of the United Nations or any special agency, such as ILO, to enforce. Such a holding would constitute law and would protect the individual states.

But repeated efforts to have the International Court of Justice adjudicate the scope of Article II, Section 7, and determine what are international and what are domestic questions have been sidestepped by the organs of the United Nations. Some of the specialized agencies have even passed amendments to their constitutions which tend to discourage or delay access to the court. The Draft Covenant of Human Rights contains a similar provision suspending access to the

that the nation approving is yielding a portion of the independence of its domestic life.

Two possible safeguards, to some extent, might have cured this situation for the United States:

(1) It is the rule in all but a very few other countries, and in important countries generally, that treaties take effect as municipal or domestic law only when implemented by legislation enacted by the full legislature. This is not the law in the United States and a few other countries. Since the United States Constitution makes the treaty the supreme law of the land, this safeguard does not exist for the United States. When a treaty is ratified by the United States and is in effect, it needs no enabling legislation by Congress to make it effective. This creates an inequality of international obligation between countries which in their constitutions have protection that the United States does not have. The fact that other nations have this safeguard has not so far created a critical situation, for the nations in general implement treaties which they ratify. Whether they will in the future implement treaties which affect domestic life as readily as they implemented treaties which were obviously of international scope is a question so far unanswered. But if the United States were not bound by the supremacy clause and had the authority to pass enabling acts to put treaties into force, as is the case with the great majority of other nations, then Congress, where neces-

court. Both of these possible safeguards at present are non-existent.

This is a serious situation. The efficiency of the United Nations, which is our only functioning organization for world peace, may eventually be impaired. However, there are remedies which, if pursued, would solve the problem:

(1) The United States Constitution could be amended to provide in substance that:

(a) Treaties which conflict with the United States Constitution are invalid.

(b) Any treaty which directly and substantially interferes with the domestic jurisdiction is invalid except where the subject matter presents a truly international problem which requires international action to handle it.

(2) The United States could demand that specialized agencies be prohibited from intervening in the domestic affairs of member states. Specialized agencies should recognize this limitation on their functions.

(3) The representatives of the United States both in the United Nations and in all specialized agencies could refuse to vote to submit for ratification proposed treaties or conventions which directly and substantially encroach upon domestic legislation.

Such conventions are defended upon the ground that "universality" is essential for the solution of world problems. But there are no "wonder drugs"

for the healing of nations. True universality is the universality of principles—justice, ethics, human brotherhood. Recognition and practice of these principles by each country in its own unique field of experience results in "diversity within unity." For example, in the realm of mathematics, whether a man uses an adding machine or counts on his fingers, the principles at work are the same. And each man is applying those principles in his own field, which for individual as for community is his priceless field of freedom, his freedom to learn by mistakes, his freedom to progress. That field alike for men and nations should be forever inviolable.

The hopeful attention of the world is centered on the United Nations. It was created by a heart-weary world which at every point needs friendship and counsel, not interference and trouble-making regulation. Surely it is essential, in order to establish world peace, not only to create world organization but also to establish justice and to maintain independence for every nation.

FLORENCE ELLINWOOD ALLEN

I

THE TREATY CONTRASTED WITH
STATUTORY LAW

The treaty is usually defined as a compact entered into between two or more sovereign states executed as and exhibiting the principal features of a contract. Hall says that the greater number of treaties are in fact "mere bargains,"¹ and Jessup states that in a sense all international agreements are contractual in that they derive their validity from the agreement of the parties.²

From the Treaty of Westphalia in 1648 to 1783, the treaty was usually a business compact between sovereigns who considered provinces and countries to be their private property. This is an ancient viewpoint. When Themistocles fled from Athens around 466 B.C. to take refuge with his ancient enemy, the Persian King, he was given three cities in Asia Minor to maintain him in bread, meat, and wine, one to provide him with clothes, and one with bedding and furniture. When Queen Mary said that, when she died,

on her heart they would find written "Calais," she was pouring out her grief for the loss of a valuable seaport, her private property. The partitions of Poland are an example of the same system. From 1763 to 1795, there were three divisions of Poland, in which Russia, Prussia, and Austria took, first one-third, then two-thirds, and then the entire unhappy country. As Catherine the Great said to Prince Henry of Prussia, "It seems that in this Poland one has only to stoop and help one's self." While it is true that these countries and provinces, dealt with so casually, belonged to the kingdom or state, as Louis XIV said, the King was the State.

The treaty, therefore, was used for the settlement of what purported to be matters of state but were in fact the private affairs of sovereigns. Phillimore, the great English authority on international law, declares that from 1648 to the recognition of American independence in 1783 little consideration was paid to anything except the rights and interests of sovereign and reigning families. The period from 1783 to 1859, he says, shows increased recognition of the rights of states, and since 1859 a new principle has arisen in that regard as to the rights of nationalities.¹

The treaty, then, has a background of being the private compact of the sovereign, possessing among other things the temporal finality of contract. The agreement was to be performed usually within a specified

time. Phillimore, in fact, lists among the maxims which should be stated as the foundation of treaties that "The provisions of the treaty should be immediately and finally operative, not imposing upon States future obligations other than those of conformity with the law of nations, and of living at peace and amity with each other." He concedes that there are cases in which the only way to take security against wanton aggression is to impose some special burden or constraint upon a state, at any rate for a time. But he says, "None of the treaties imposing special obligations can be, or ought to be, expected to be perpetual."⁴

This is a major distinction between the treaty and statute law. A statute, unless it declares otherwise, is meant to be effective indefinitely until modified or repealed. The controlling distinction, however, between the compact treaty and the statute is that the statute purports to regulate society and, generally speaking, the statute regulates internal and domestic affairs while the treaty affects primarily international relationships.

The framers of the United States Constitution recognized the contractual characteristics of the treaty when they framed the clause which makes treaties "the supreme Law of the Land," binding upon judges in every state (Art. VI, cl. 2). Jay, in arguing in favor of this provision (The Federalist, No. 64),

says that some people who oppose the supremacy clause

insist . . . that treaties, like acts of assembly, should be repealable at pleasure. . . . These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.

Hamilton (The Federalist, No. 75) pointed out that the power to make treaties did not fall strictly within either the executive or the legislative function. He said,

The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions

of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enactment of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislature nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

There are other differences between statutes and contracts than those pointed out by Hamilton. A statute duly enacted remains in force until it is amended or repealed. It contemplates long-term existence. A contract is in force until it is completely performed, which may be within a short time. A statute, under modern systems, is publicly proposed, publicly considered, publicly shaped and amended, and publicly passed by the lawmaking body. A contract is usually negotiated quietly or even secretly by the parties, and may be published only when it is fully executed.

But when the Constitution of the United States was written, the treaty, which usually was contractual, be-

came throughout every one of the Thirteen States law binding upon the judges and overriding the Constitutions of the States, in truth "the supreme Law of the Land." James Wilson, one of the ablest members of the Constitutional Convention, pointed out that, if treaties were to have the operation of laws, they should have the sanction of laws. He therefore moved to add the words "and the House of Representatives" after the word "Senate" in the clause which grants to the Senate the power to ratify treaties.⁸ But the view that treaties must be negotiated in secret and that the House, with its numerous membership, would be unable to maintain secrecy, prevailed over Wilson's view, and the supremacy clause was enacted as it stands today. The result is that the framing of treaties is a wholly executive function. The treaties, so far as form is concerned, are presented to the Senate as an accomplished fact. The Senate may reject them in toto, make reservations, or reject separate articles; but the changes that it proposes do not become effective until they are accepted by the country with which the treaty is made.

When the founding fathers made the treaty the supreme law of the land, little mention was made of the inherent distinction between treaty and statute, and none of the fact that requisites for negotiating a compact and for passing a law are inherently different. Since the treaty is a contract, it is often initiated

by an offer made by one government to another or to several other governments, which is accepted. In other words, it is a prerequisite to the treaty that there be a "meeting of the minds" between two or more states. The statute is enacted by the legislature of one single state, and the consent or agreement of another country is neither sought nor required. Being a contract, the treaty, as a practical matter, had to be negotiated by the executive—in our country, the President. This conformed to the fact that the treaty is a compact between sovereigns. Also, experience had shown that secrecy was an aid to negotiation. The advantage of having the negotiation handled by the head of the state as an executive function, plus the secrecy, was stressed in *The Federalist* in the arguments in favor of the Constitutional Supremacy provision as to treaties. The arrangements for the agreement could not be handled efficiently by a legislature; and the delicate adjustments of offer, counter-offer, and compromise have proved to be most feasible in the give and take of private conference.

But mankind has found that law made by one man results in despotism. Mankind now knows that law must be made by representatives of the people and that, in the enactment of law, secrecy, so far from being necessary, must in every way be prevented if liberty is to be maintained. Hence in civilized countries both the law and the procedure of centuries re-

quire successive readings of proposed legislation and full publicity as to pending bills. The various stages of the drafted proposals are made accessible not only to members of the legislature but to the press and public. The Constitution of the United States provides (Article I, section 5, clause 3),

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Article I, section 7, clause 2, provides that if the President of the United States does not approve a bill enacted by both houses "he shall return it, with his Objections, to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." The votes of both houses shall be determined by yeas and nays "and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively." Similar provisions, as well as provisions for successive public readings of bills, exist in the state constitutions and state statutes, and laws which were passed without the provisions for publicity being complied with have been held to be null and void.

It is true that the two-thirds vote required for ratification by the Senate (Art. II, section 2, United

States Constitution) is sometimes more difficult to secure than a mere majority vote in both houses of Congress. It is also true that all proceedings with reference to advice and consent to ratification are a matter of public record. But the essential steps in the framing of a treaty submitted to the Senate are neither within the control of the Senate nor, as the situation has developed today, are they publicly recorded in many instances. The fact that the treaty is not drafted by the body which consents to its ratification is of supreme importance. Treaties now submitted either by the United Nations or by the specialized agencies are drafted by international commissions or bureaus. This is an essentially different process from the negotiation of a treaty between the United States and another country, where the President may appoint commissioners to examine the problem or where the treaty is drafted by our own Department of State and presented to another country for consideration. Now in many cases the treaty is submitted to the Senate, having been drafted by a remote international organ. It is true that the Department of State gives it close scrutiny, but the shaping and the framing of the treaty are something with which the United States has little to do. Legislation, on the other hand, is shaped by our own elected officials and is subject to scrutiny from start to finish. The original bill, the amendments, the hearings in committee, are all matters of public rec-

ord. This is the safest process when the United States is asked to adopt legislation proposing changes in our domestic law.

However, to have all treaties approved by the full Congress is not the complete answer. The source of the difficulty is the lack of demarcation between the use of the treaty for international matters and its use for legislation on matters of domestic concern. This is a deep-seated problem which must be solved.

If a treaty proposes, not an act such as the cession of territory or the payment of a sum of money—if, on the contrary, it contemplates the regulation of national and international life far into the future, it has predominantly legislative character which requires that it be enacted by a legislature with the safeguards and publicity of legislation. It was because of this fact that James Wilson proposed in the Constitutional Convention that the treaty regarded as supreme law should be enacted as law by the Congress of the United States.

These distinctions between the treaty and the statute and their method of adoption must be understood and emphasized today, because the nations of the world are beginning to enact international law on a wide scale through the medium of multilateral treaty. Many of the great multipartite treaties are analogous to legislation. Others, such as the Charter of the United Nations, are even of a quasi-constitu-

tional character.⁶ In earlier times the usual treaty was executed by two, or only a few, nations. But a number of the multilateral treaties are executed by many nations and bind practically the civilized world. Also, under the United Nations treaties begin to reach out into the field of domestic legislation and even touch on internal constitutional law. Moreover, the extensive use of the multilateral treaty will increase with the continued existence of the United Nations and its specialized agencies which operate extensively through this type of international agreement. It may be questioned whether the governments have considered all the possible phases of this new method of lawmaking. Without the people's being fully aware of the scope of the action proposed, the governments begin to enact domestic law under the guise of international treaty.

II

EFFECTS OF THE CONSTITUTIONAL
METHOD OF MAKING TREATIES

When the United States Constitution was adopted, it was a rule of international law that a sovereign or state was bound to ratify a treaty to which a minister acting with instructions and under full power had agreed. In 1807 the President informed the British Government that the Senate had recommended certain changes in a proposed treaty between the United States and Great Britain, and that the United States would ratify it if so amended. George Canning, then Under-Secretary of State for Great Britain, stated that this was "a practice altogether unusual in the political transactions of States," and elsewhere he wrote, "there are many advantages in considering these propositions as a direct refusal of the treaty."¹

On the other hand, Great Britain expressed no disapproval as to the modifications of the Jay Treaty of 1796 suggested by the Senate. This treaty covered the

claims of the United States against Great Britain arising out of her retention of military posts after the conclusion of the Revolutionary War, the carrying off of Negroes by Great Britain, the use of the rivers of North America, the West Indian Trade, and many other subjects. The Senate agreed to approve the treaty upon condition that Article 12 be suspended with respect to trade between the United States and the West Indies. Great Britain acceded to this demand; ^a but with respect to the King-Hawkesbury Treaty of 1803, ^b the foreign office of Great Britain was openly contemptuous of the Senate's assertion of its prerogative. This convention was framed to fix the northeast and northwest boundaries between the United States and British territory after the Revolution. It was agreed that the boundary should be the shortest line from the Lake of the Woods to the nearest source of the Mississippi. Four days before this agreement was submitted to the Senate, the Treaty of the Louisiana Purchase was ratified. A Senate Committee reported that the contemplated treaty with Great Britain might interfere with the northern limits of Louisiana. The Senate voted to strike out the fifth article, which dealt with this feature, before consenting to ratification of the treaty. Lord Harrowby stated that Great Britain never could acquiesce in the precedent that the American Government could agree "to ratify such parts of a convention as they

may select." Great Britain therefore refused to acquiesce in the elimination of Article 5, and the treaty did not enter into force.

The provision in our Constitution changed the rule that a treaty negotiated by a minister acting with full power and according to instructions must be ratified, but we still enforced it against other states. For instance, we protested against the refusal of Spain in 1819 to execute the Florida Treaty, which had been negotiated under full powers issued by Spain to its minister. Our Secretary of State declared, "By the universal usage of nations nothing can release a sovereign from the obligation of a promise thus made, except the proof that his minister so empowered has been faithless to his trust by transcending his instructions."¹⁰

But while this rule has now been abrogated in most of the constitutions of the civilized world, which require approval of treaties by the national legislative bodies, the view has persisted among national and international officials that a state has no right to negotiate a treaty and then fail to ratify it. In fact two of the most distinguished Presidents of the United States, with reference to important treaties, acted as though the rule were still in force and the Senate was bound to approve a treaty negotiated by the President.

As high-minded a patriot as George Washington, who had sat in the Constitutional Convention and

voted for the provision that the Senate should advise and consent to the making of treaties, early in his administration considered that when he presented a treaty to the Senate with his approval it should automatically be ratified. Maclay, a member of the Senate during this period, gives a significant account of Washington's reaction to the Senate's view that it was not compelled automatically to endorse the treaty negotiated.

A treaty was in prospect with the Southern Indians, and President Washington came to the Senate on August 22, 1789, to settle upon its terms. The Senate had just taken up the Coasting Bill when the President was introduced. Maclay said that Washington

rose and told us bluntly that he had called on us for our advice and consent to some propositions respecting the treaty to be held with the Southern Indians. Said he had brought General Knox with him, who was well acquainted with the business.

. . . General Knox handed him a paper, which he handed to the President of the Senate. . . . Seven heads, as we since have learned, were stated at the end of the paper, which the Senate were to give their advice and consent to. They were so framed that this could be done by aye or no.

The President of the Senate proceeded to ask the advice and consent of the Senate on the first proposition. Mr. Maclay asked for the reading of the treaties and documents mentioned in the paper. Maclay again

took the floor and moved a postponement until Monday. The question was put and carried. Mr. Morris moved that the papers be referred to a committee of five directed to report as soon as might be. Maclay supported this. To the Senator's surprise, as he sat down,

the President of the United States started up in a violent fret. "This defeats every purpose of my coming here," were the first words that he said. He then went on that he had brought his Secretary of War with him to give every necessary information. That the Secretary knew all about the business, and yet he was delayed, and could not go on with the matter. He cooled, however, by degrees. Said he had no objection to putting off this matter until Monday, but declared he did not understand the matter of commitment. He might be delayed. He could not tell how long.

He rose a second time, and said he had no objection to postponement until Monday at ten o'clock. By the looks of the Senate, this seemed agreed to. A pause for sometime ensued. We waited for him to withdraw. He did so, with a discontented air.¹¹

Washington thought that, when a treaty had been negotiated according to the instructions given, it should, as a matter of course, after a mere cursory consideration by the Senate, be approved. This was in fact the view of the Senate itself as to the Jay Treaty of 1788, the Consular Convention with France, concerning which many objections were raised.¹² Jay himself, Secretary of Foreign Af-

fairs, said he apprehended that this convention would prove more inconvenient than beneficial to the United States.¹⁸ Since it had been negotiated by duly accredited agents under a plan agreed to by Congress and amended as suggested by Congress, the Senate felt compelled to approve.

The most striking example of the attitude taken by officials of the United States upon the power of the Senate to make reservations to proposed treaties is Woodrow Wilson's attitude in the League of Nations controversy. President Wilson publicly dubbed the proponents of the reservations to the League Covenant a little group of willful men. A revealing story of his attitude is told by Viscount Cecil in describing a visit to President Wilson in 1919. Viscount Cecil says:

On February the 14th he went back to Washington for a month, and while there interviewed the recalcitrant Senators without mollifying them. Indeed, to transatlantic observers his methods of controversy did not seem to err on the side of conciliation. No doubt he resented what seemed to him a wicked attack on a great effort for world peace, carried on for party purposes and built up on the ill-informed prejudice of his fellow-countrymen. Whether this was the true view of the position it is not for an Englishman to judge. There can be no doubt of the President's bitterness on the subject. On his return to Paris, he invited Colonel House and myself to dinner to discuss the American situation and especially certain suggestions of changes in the Covenant

which our friends in the States, led by the veteran Senator Elihu Root, thought might mitigate opposition. The most important of them was the provision which makes it clear that the validity of the Monroe Doctrine is not affected by the Covenant. The dinner was very agreeable, the President exerting himself to entertain us by telling a number of stories, which he did very well. After dinner, we three retired to another room to consider the American amendments. To most of them it seemed to House and me there was little objection, and we were quite ready to go almost any distance to secure the two-thirds majority in the Senate necessary for ratification. As each amendment came to be considered, if House or I recommended it as an improvement to the Covenant, the President was quite ready to accept it. But if either of us suggested that it would be a reasonable concession to Senatorial feelings, the President was up in arms in a moment and, in order to get his agreement, we had hastily to explain that on its merits it was unobjectionable.

It may be that a more conciliatory attitude on his part would have saved the Treaty.¹⁴

While other nations have been compelled to accept the right of the Senate to reject or amend negotiated treaties, their reaction has often been hostile. The foreign offices of other nations have never liked our system. In the case of the failure of the Senate to approve the treaty embodying the Covenant of the League of Nations, influential public opinion throughout Europe expressed the view that the failure of the United States to ratify a treaty largely shaped and ne-

gotiated by her President, in spite of the Constitutional provision making ratification subject to the advice and consent of the Senate, was a breach of faith. This was the view of Woodrow Wilson himself.

A reprint in *The New York Times* of March 24, 1920, quotes the *London Daily Graphic* as saying:

During more than eight months the Senate has been discussing the European settlement and meanwhile, largely owing to that, delay and confusion have become worse and worse throughout stricken Europe. The inability of the Senate to come to a decision has caused fearful misery and has cost countless lives.

Democracy is government by discussion. During the war and after its conclusion we have heard numerous protests against secret diplomacy and have been adjured to conclude a democratic peace. The United States form the greatest and freest democracy in the world. The endless and fruitless discussions in the American Senate have scarcely increased the prestige of democracy with regard to its management of urgent and vital foreign affairs.

In view of the reaction of such truly great statesmen as George Washington and Woodrow Wilson to this situation, as well as the persistence of the Old World view that a treaty duly negotiated must be ratified, it is not surprising that enthusiastic officials in international agencies who have framed conventions which they think would advance their particular projects should believe today that nations which fail to ratify treaties are "willful" and should be brought

before the bar of public opinion. This is particularly so when the representatives of the country censured have taken an active part in framing the proposed convention, or have voted for it in conference.

But the possible pressure of an administration which believes that a treaty it has negotiated should be ratified without concession, as Woodrow Wilson thought, or of an international bureau which believes that member states are required to ratify conventions submitted to them, makes all the more important and even necessary cool and deliberate consideration of these international compacts, by the press, the public, the State Department, the Senate, and the President.

Over twelve hundred international agreements made by the United States since 1789 have been handled not by treaty but by executive agreement, or by joint resolution of Congress, the most important of the executive agreements being either authorized or approved by Congress. They include agreements for the annexation of Texas and Hawaii, for the conclusion of World War I, for settlement of the extensive debts arising out of World War I, for submitting important controversies to international arbitration, for the acquiring of Atlantic naval bases in British territory during World War II. The modification of the tariff made in reciprocal trade agreements was done under congressional authority. Our adherence to the

International Labor Organization was authorized by joint resolution of Congress.

The Supreme Court has given executive agreements the effect of treaties (U.S. v. Belmont, 301 U.S. 324; U.S. v. Pink, 315 U.S. 203, 230) and has thus construed them as being part of the "supreme Law of the Land."

III

PRACTICAL RESULTS
OF THE SUPREMACY CLAUSE
OF THE CONSTITUTION

Due to the inclusion in the Charter of the United Nations of provisions with reference to Human Rights, the past few years have given the world various proposals in this particular field. Among them are the Universal Declaration of Human Rights, the Genocide Convention, and the draft of a Convention on Human Rights proposed by the Commission of Human Rights of the United Nations. The Universal Declaration is not a treaty, was adopted only by the Assembly of the United Nations, and, as it expressly states, is not binding upon the member states.

But the Draft International Covenant on Human Rights is in treaty form. Since the Draft Covenant contains broad legislative provisions, it raises critical questions. Over and above the legal uncertainties in certain proposed provisions of the Draft Covenant, a preliminary question of extreme moment arises, im-

portant not only to the United States but to every other member of the United Nations because of its repercussion upon the spirit of international cooperation within the United States.

Under the Constitution of the United States a treaty, when fully executed and in force, is the supreme law of the land. The negotiations and adherence to a treaty by any civilized nation other than our own are, in general, not binding as law until the treaty has been implemented by the parliament; but in this country a self-executing treaty, when negotiated by the President, approved by the Senate, ratified and in force, automatically becomes a part of United States law, on an equality with an Act of Congress and binding upon the "Judges in every state . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Art. VI, cl. 2, United States Constitution) This is not the law in England. (Lauterpacht, *An International Bill of Rights of Man*, 179.) Treaties that involve a charge on the English people or a change in the law of the land can be carried into effect only by an act of Parliament. (Anson, *Law and Custom of the Constitution*, 109.) The constitutions of most of the Latin American countries and of numerous other nations expressly require approval of treaties by the full parliament.

As shown by Peaslee, in his exhaustive work *Constitutions of Nations*, two other states, Mexico and

Paraguay, make treaties the supreme law of the land. The Mexican provision, Article 133, declares: "The judges in every state shall be bound by this Constitution and by those laws and treaties, in spite of conflicting provisions in the constitution or laws of any state."

The Constitution of France, Article 26, provides that diplomatic treaties duly ratified and published shall have "the force of law" even when they are contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to insure their ratification. However, Article 27 provides:

Treaties relative to international organization, peace treaties, commercial treaties, treaties that involve national finances, treaties relative to the personal status and property rights of French citizens abroad, those that modify French internal legislation, as well as those that involve the cession, exchange, or addition of territories, shall not become final until they have been ratified by an act of the legislature.

The states of Nicaragua and Ecuador have protected the basic law of their countries against the possible encroachment of treaties. The provision of the Nicaragua Constitution, Article 285, is almost identical with that of Ecuador. It reads as follows:

The Constitution is the supreme law of the Republic. No laws, decrees, regulations, orders, dispositions, pacts,

or treaties which are in conflict with it or which in any way alter its provisions have any validity.

The provision that treaties are the supreme law of the land has been extensively construed by the Supreme Court of the United States, which has repeatedly held treaties to be on a par with congressional statutes, superseding conflicting state law. Lauterpacht, certainly one of the most distinguished contemporary students of constitutional and international law, goes so far as to say that in *Missouri v. Holland*, 252 U.S. 416, the Supreme Court gave a treaty protecting migratory birds a construction "dangerously approaching that of a constitutional amendment." (Lauterpacht, *op. cit.*, 179.) The fact that a treaty in the great majority of other countries, even when ratified, does not necessarily become part of the municipal law, while in the United States and a few states it does, creates an inequality of international obligation. In the past, this advantage possessed by other states has not been as important as it appears upon first consideration, for states signatory to a treaty in general take the steps necessary to put it in force. But in the future, because of the use of the treaty process for enacting domestic legislation, it may become dangerous.

The constitutional provision that treaties are part of the supreme law of the land was written at a time when the usual treaty was a contract between sovereignties. The framers of the Constitution were de-

terminated that no state should impair the obligation of contract and that no state should make treaties with foreign powers. It was originally proposed in several resolutions which were adopted that Article VI of the Constitution should make treaties binding upon the states. It did not, as originally drafted, declare them to be the supreme law of the land. However, it was realized that in order to establish stable commercial relations with other countries the Constitution must ensure that the Federal Government could and would carry out its treaties, and later in the constitutional proceedings the article was redrafted and enacted in its present form.

It was an advance in international law and in political thinking that the Constitution provided for submission of treaties to the Senate prior to ratification, for at that time, throughout the civilized world, the executive had complete power over foreign relations. But it was never contemplated by the founders of the Republic that the supremacy clause should place citizens of the United States in the position of having domestic law made for them by treaty. This is all the more important now because there is a vast distinction between the contractual type of treaty and treaties such as the Draft Covenant of Human Rights, which proposes actual changes in the law of member states in questions purely domestic.

The problem was not created for the United States

by the United Nations. It was created by the United States Constitution. In construing the constitutional provision, the Supreme Court has held that a treaty will prevail over any conflicting provision of state law (*Clark v. Allen*, 331 U.S. 503). Chief Justice Hughes, in *Pidgeon River Improvement Co. v. Cox*, 291 U.S. 138, declared that an Act of Congress passed subsequent to a treaty is a "later expression of our municipal law" and thus reiterated the rule of the *Head Money Cases*, 112 U.S. 580, that a treaty may be modified or repealed by subsequent Act of Congress. This holding is in effect followed in *Moser v. U.S.*, 341 U.S. 41. However, it unquestionably is the law that a subsequent treaty abrogates a statute on the same subject which is in conflict.

At the meeting of the American Society of International Law, April 26, 1929, which considered "The Limitation of the Treaty-making Power of the United States in Matters coming within the Jurisdiction of the States," Chief Justice Charles E. Hughes said:

If we take the Constitution to mean what it says, it gives in terms to the United States the power to make treaties. It is a power that has no explicit limitation attached to it, and so far there has been no disposition to find in anything relating to the external concerns of the nation a limitation to be implied.

Now there is, however, a new line of activity which has

not been very noticeable in this country, but which may be in the future, and this may give rise to new questions as to the extent of the treaty-making power. I have been careful in what I have said to refer to the external concerns of the nation. I should not care to voice any opinion as to an implied limitation on the treaty-making power. The Supreme Court has expressed a doubt whether there could be any such. That is, the doubt has been expressed in one of its opinions. But if there is a limitation to be implied, I should say it might be found in the *nature* of the treaty-making power.

What is the power to make a treaty? What is the object of the power? The normal scope of the power can be found in the appropriate object of the power. The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns. (p. 194)

So I come back to the suggestion I made at the start, that this is a sovereign nation; from my point of view the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments. But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for

the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power. (pp. 195-6)

But human rights are a matter of international concern. This has been tragically demonstrated in the concentration camp, the gas chamber, and the denial of basic rights to human beings in various countries of Europe since World War II was supposed to end. While Geofroy v. Riggs, 133 U.S. 258, concerned a question of inheritance in this country by aliens under a treaty, it broadly laid down the principle that whatever is a proper subject of negotiation between nations is an appropriate subject of treaty. Certainly the protection of human rights is a proper subject of negotiation between nations; in fact, the Charter of the United Nations so handles it. It is fair to conclude that the fact that individual rights are sweepingly affected will not of itself alone affect the validity of a proposed treaty. But the realistic fact remains that every citizen of the United States, if the proposed Covenant of Human Rights is approved by the Senate, ratified, and goes into force, will have domestic law made for him by treaty submitted to only one legislative body, the Senate, and not enacted by his Congress.

The sweeping character of the international legislation proposed in the Draft Covenant and submitted

by the specialized agencies requires not only the officials charged with the decision as to ratification, but the citizens of the United States, to consider carefully every treaty submitted to them for approval. The country as a whole must realize more than it has in the past that the treaty method of making law lacks the safeguards that exist under its constitutional method of legislation. It must ask that the President, the State Department, and the Senate constantly bear in mind these facts:

1. that any treaty under consideration, if ratified and in effect, is the supreme law of the land;
2. that it may be construed by the Supreme Court as amending laws already passed and being administered in the nation and in the states; and
3. that if it covers international matters, even the constitutional guaranties may be interpreted as affording no protection (*Missouri v. Holland, supra*). Treaties of a nature and scope never anticipated might be held constitutional.

That the President and our State Department have been commendably conservative in recommending this type of legislation is shown by the fact that up to this time less than 10 per cent of the ninety-eight treaties framed, adopted, and proposed by the ILO have been ratified by the United States. However, the pressure to ratify other sweeping measures is constantly

being intensified by international organizations.

Every citizen must understand that the approval of treaties which go into force makes law for him, binding him individually through all the courts and administrative bodies, and that this law will be shaped and framed by an international organ in which even the representatives of the United States are not elected by nor answerable to him. He must scrutinize the content of the Draft Covenant of Human Rights and similar treaties with unusual care. The protection of the more thorough consideration of legislative proposals made, not *ex parte* by the Executive but publicly by the legislature itself and enacted by both of the legislative chambers, does not exist for him as to treaties proposed, particularly in the case of proposed treaties that receive little publicity. The recent proposal by Mrs. Eleanor Roosevelt that the Draft Covenant be separated into two instruments, one dealing with political rights and the other with economic and social rights, has great practical value. It does not, however, dispose of the problem presented by the body of the proposals which, of course, are in a formative stage.

The people of the United States must understand that they are conclusively bound by the mere ratification of a treaty that goes into force. Citizens of other countries must also understand this dilemma in order that they may realize that, if Americans hesitate to

ratify treaties, this hesitation may be caused not by opposition to the subject matter of the treaty but by unwillingness to support laws not enacted by their Congress.

How far-reaching are the proposals which may become domestic law in this country by the treaty method is shown in the Draft International Covenant of the Commission on Human Rights of April-May, 1951. Articles 3 to 18, Part II, covering Civil and Political Rights, include provisions usual in Bills of Rights intended to guarantee freedom of speech, religion, assembly, information, equality before the law, and rights of those accused of crime. But Articles 13, 14, 15, and 16 allow freedom of religion, of thought, of speech, of information, of peaceful assembly, and of association to be restricted in order to protect "public order" or "public safety." A typical restriction is that in Article 14, which allows penalties, liabilities, and restrictions to be imposed upon the "right to seek, receive and impart information and ideas." The restrictions are to be "such only as are provided by law and are necessary for the protection of national security, public order, safety, health or morals, or of the rights, freedoms or reputations of others." Obviously the limitation upon these personal guaranties makes them meaningless. The guaranties of the United States Constitution are definite and positive and cannot be suspended in this or that claimed

public emergency. If some Congress of the United States should pass laws in purported protection of the national security and public order under the United Nations Covenant, suspending freedom of speech and of the press, would the United States Constitution in these respects control? Which would prevail?

The writer thinks that the United States Constitution should prevail (*Cf. Geofroy v. Riggs, supra*). But in view of *Missouri v. Holland, supra*, this cannot be categorically assumed. In that case Mr. Justice Holmes declared:

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. . . . It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . .

This seems to hold that a treaty does not have to conform to the Constitution. The question should not be allowed to arise.

The confusion raised by these equivocal provisions with reference to personal liberties is increased by the fact that the various nations of the world construe the provisions entirely differently and hasten to approve them with the idea that they are binding in the sense understood only by them. The Iron Curtain group of nations is especially prompt in ratification.

The right to life is protected in the Draft Covenant by the sweeping statement that "Everyone's right to life shall be protected by law." It is added, in Article 3, par. 3,

In countries where capital punishment exists, sentence of death may be imposed only as a penalty for the most serious crimes, pursuant to the sentence of a competent court and in accordance with law not contrary to the Universal Declaration of Human Rights.

In the United States and Great Britain this means crimes such as deliberate murder and treason. In Communist China vast purges are going on now of those who oppose the Reds. In Soviet Russia and the satellites, criticism of and opposition to the government, so-called "deviation," is a serious, perhaps the most serious, crime, punishable by death. What do the basic freedoms mean under these realistic circumstances? Should the Constitution of the United States, with its definite personal guaranties, be subjected to serious question by a covenant interpreted so variously by the nations which may join in its enactment?

Another serious consideration arises out of Articles 33 to 69 of the Draft Covenant covering the implementation machinery contemplated to be set up to enforce these provisions. It has not been decided whether this machinery should apply to the economic, social, and cultural rights sweepingly declared in Ar-

articles 19 to 32, but it does cover Articles 3 to 18 discussed above (freedom of speech, press, assembly, religion). Article 52 provides that, if a State Party to the Covenant considers that another State Party is not giving effect to a provision of the Covenant, it may notify that State and, if the matter is not adjusted to the satisfaction of both parties within six months, it may refer the matter to a Human Rights Committee, a quasi-judicial body which will find the facts and make basic recommendations. If these provisions are adopted, then some nation may charge that the United States is violating some provision of the Covenant, such as Article 17, the anti-discrimination article, under which it might say that the United States was not protecting migrant workers. Under Article 59, the United States would be bound not to submit this matter to the International Court of Justice, and it might be found guilty before this international quasi-court, the Human Rights Committee. Would this make for international peace?

Possibilities for tension on international matters will arise out of these attempts to legislate so extensively through treaty, and will hamper full cooperation of the United States with other nations of the world. For it is now evident that thinking Americans, even if they approve the purpose and content of certain international proposals, will not approve

of having them become the law of this country unless enacted under the usual processes by their own Congress.

The immediate question might be disposed of if every treaty proposed in the United Nations contained a provision that it should become the law and binding in the individual countries only upon enactment by the national legislature or parliament. This would relieve the present inequality of obligation, but it would not dispose of the fact that domestic law might still be enacted under the guise of treaty.

It may be that other governments would accept the theory of the United States State Department that Article 1 par. 2 of the Draft Covenant makes it clear that the provisions of the Covenant would not be enforceable in United States courts as the supreme law of the land, without further legislation. To the writer this provision seems anything but clear as applied to the United States, in view of the fact that a ratified treaty for us is law and the equivalent of legislation. But whatever its effect, the Senate approval and ratification, if given to this Covenant, should declare that the ratification will be effective only in accordance with the Constitution of the United States, and only to the extent of implementing statutes passed by the Congress. The United States should be doubly sure that none of the sweeping provisions of the Draft Covenant will become

domestic law unless they conform to the Constitution and are enacted by its Congress.

One way to prevent war is to relieve international tensions and to increase international cooperation. The overwhelming desire of the United States, as shown by the Marshall Plan and the burdens carried for the United Nations in Korea and elsewhere, is to cooperate in building world peace, but cooperation is not going to be increased by forcing Americans to effect sweeping changes in domestic law through the medium of treaty.

IV

TREATIES PROPOSED AND
REGULATIONS
ADOPTED BY
SPECIALIZED AGENCIES

The question as to the scope and effect of international agreements is by no means limited to well-publicized treaties such as the Treaty of Peace with Japan, the Genocide Convention, and the Draft Covenant of Human Rights. The problem is more far-reaching than the average citizen realizes. For the various specialized agencies which act in cooperation with the United Nations, such as the ILO and the FAO, often operate through conventions which are framed by a particular agency and then submitted to the separate countries for ratification. Conventions were formerly regarded as international agreements dealing with the less important subject matter of international negotiation.¹⁶ But these conventions offered by the specialized agencies have all the scope of treaties and are of a distinctly legislative character.

When a nation adheres to the constitution of a specialized agency it may become bound by the regulations issued by the agency. The specialized agencies operate under a constitution and regulations framed by their member governments. The governing board of each agency has representatives from the various member states which help to decide upon the policies followed and projects undertaken. For example in ILO the governing board drafts conventions to be submitted to the member states for ratification, and copies are sent to the members of the conference for comments and suggestions. The final vote to submit the convention to the member states is taken at the yearly conference. Each member state has two government representatives and, in addition, one for labor and one for employers. A number of the treaties submitted by ILO which the United States has not ratified have been voted for in the conference by the representatives of the United States Government and labor. These particular conventions, therefore, have been submitted to the Senate for advice and consent to ratification, having had three American votes cast in favor of them. Some of them have been voted for by all American representatives.

In the following pages some of the conventions submitted and regulations adopted by specialized agencies are discussed, with examples of typical action by some of the more important agencies. The first

question to be considered is what subjects of legislation through treaty, convention, or international regulation are inherently domestic.

The declarations of the United States Supreme Court which have extended the reach of international power to cover any subject of international concern bind the United States only. Apart from these decisions, which leave grave questions unanswered, international custom through the centuries has defined what subjects of law are domestic rather than international. Over the civil and criminal laws which affect the lives of permanent residents of any country with reference to acts performed wholly within that country, it has in the past always been considered that the state of residence has jurisdiction. These plainly are domestic matters.

Mr. Justice Holmes, in *Missouri v. Holland*, 252 U.S. 416, laid down a classic definition of the subjects which are clearly international and aids us by the process of exclusion to define subjects which are clearly domestic. This was the migratory birds case, which involved the validity of a statute enacted under a treaty between the United States and Great Britain for the protection by closed seasons of birds migrating in the United States and Canada. The State of Missouri claimed in effect that only domestic interests were involved of which the State had jurisdiction and that the treaty and statute were invalid. Mr. Jus-

tice Holmes pointed out that while a national interest of the greatest magnitude was involved, it could only be protected by national action in concert with another power. He then significantly commented that the subject matter (the birds) is "only transitorily within the State." This, then, is a principal test as to whether the persons and activities covered by a proposed treaty or international regulation fall within international or domestic jurisdiction. If the persons proposed to be affected are not transitorily within the State, if they are permanently within the State and if what they do is done within the State, the jurisdiction is domestic. What this means in non-technical words is that men and women who live in Maine, New York, Alabama, or California, or any American State, who earn their livings there and live their lives there, are subject to be governed by the State in which they live and by the United States but not by any other nation or the United Nations.

A true treaty is one which in fact deals with international affairs—treaties of peace, settlements of war problems, deep-sea fishing rights, cession of territory, transportation and communication between the nations, international traffic in drugs, and similar problems. As Chief Justice Hughes states, only subjects of genuine international concern are the proper subject of treaty; and, while the area of international concern has been extended in our times, it certainly

never was expected to include domination of the domestic affairs of the states of the world. It is of no international concern, for instance, whether men are paid by check or cash. Yet the ILO Treaty on the Protection of Wages, No. 95, purports to regulate that situation and provide when and under what circumstances payment by check is valid. Doubtless some abuses exist in the various methods of payment of wages, but surely that is the concern of the individual country, which can regulate it better than a body purporting to speak for sixty nations of widely different language, race, economic development, and social condition.

Perhaps the main reason why the United States finds itself unable to ratify conventions that its representatives have helped to draft is that they are not true treaties but are pure domestic legislation. The United States should demand that the United Nations study the demarcation between true treaty and domestic law and bring influence to bear upon its associated agencies so that they propose only conventions which are true treaties. And in default of such definition by the United Nations, the United States should publicly announce its policy not to ratify treaties which encroach directly and substantially upon the domestic field.

This is the test that will be applied by the man in the street. He will not look up the decisions of any

court. But when an international treaty tells him how to act within the United States, at some point he will rebel. He rebelled against the Stamp Act and he will likewise rebel against international interference.

Applying this test, then, such conventions as the United States has ratified dealing with international telecommunication, world meteorology, whaling and other deep-sea fishing, the establishment of world health regulations, international shipping and airplane transportation, the safety of life at sea, and the protection of war victims, are true treaties, for they are clearly international in subject and scope. The traffic of the sea covers men and women of all countries of the world sailing to and from all ports of the world, carrying freight between all points of the world. Usually the crews are of highly mixed nationality. The ship is in port only occasionally, and it is impossible for any one country alone to protect either the seamen or its traveling nationals. National interests of great magnitude are involved but, in the words of Mr. Justice Holmes, they can be protected only by action "in concert with other powers."

Here, of course, it is sometimes difficult to draw an exact line between matters properly international and properly domestic. The traffic in narcotics demands international control. But as carried on in Chicago, New York, San Francisco, it becomes a domestic matter rightly handled by our local and fed-

eral criminal law. The traffic in women and children is a dark page in international history. But a moral violation in Peoria, Illinois, by two Americans is rightly dealt with under state or federal law. An indirect and incidental interference with domestic jurisdiction may not affect the validity of a treaty which deals primarily with subjects truly international. But some treaties now proposed present more than a mere incidental and unsubstantial interference with domestic jurisdiction. Under the guise of protecting human rights, they set about to regulate internal affairs of the nationals of ratifying states directly and substantially.

The Charter of the United Nations now makes sweeping private and individual rights matters of international concern. In that sense the field of international law has been extended to include subjects formerly considered domestic. But Article 2 par. 7 of the Charter withholds authority to intervene in the domestic affairs of any nation and thus declares that there are wide areas of domestic life upon which the world organization cannot intrude.

Article 2 par. 7 of the United Nations Charter, which reserves to the nations control of their domestic affairs, cannot be considered meaningless. History shows that independence of nations is essential to world peace and that men will fight against great odds to maintain this independence. The first inter-

national organization, the Delian Confederacy, 477 B.C., between Athens, the Greek cities, and the Great Islands of the Aegean, fell, not because Athens overcharged her allies. The contributions of men, money, and ships exacted from members were set up by Aristides the Just, and historians consider them reasonable. But the Greek allies could not endure the domination of Athens. They resented the fact that the important lawsuits from the Aegean Islands and the Greek cities were tried at Athens and they insisted that they should control their local governments. So the first international league failed and was destroyed.

When the Dutch resisted the Spanish for one hundred years so stubbornly that Alva suggested to Philip II that he would have to exterminate the people, it was because the Dutch were determined to control their own lives. The Boston Tea Party and the Declaration of Independence arose from the same human reactions and, in truth, the desperate resistance movements of World War II show that the spirit of independence still lives in the heart of mankind.

As a matter of fact, independence is not only vital to the countries which cherish it, but its maintenance in every nation is essential to the peace of the world. In so far as treaties, conventions, and international regulations directly and substantially encroach upon the inherently domestic jurisdiction and attempt to regulate rights and obligations, employment, hours

of labor, rates of pay, and relationships of persons permanently within the borders of any country whose activities are performed within that country, they are not wisely calculated to reduce international tension, for they interfere with what man has fought for and will fight for through the centuries—freedom and independence.

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E. ARTICLES AGAINST THE GENOCIDE CONVENTION

THE GENOCIDE CONVENTION--ITS EFFECT ON OUR LEGAL SYSTEM
By Orie L. Phillips*

On June 16, 1949, the President transmitted to the Senate the Convention on Genocide with the request that the Senate give its advice and consent to its ratification.

By this Treaty the contracting parties confirm that genocide is, "A crime under international law which they undertake to prevent and punish."

Article II and III of the Convention read:

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"ARTICLE II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

"ARTICLE III

"The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article V obligates the contracting parties to enact the necessary legislation to give effect to the provisions of the Convention and to provide effective penalties "for persons guilty of genocide or any of the other acts enumerated in Article III."

Article VI provides that 'persons charged with genocide or any of the other acts enumerated in Article II shall be tried by a competent tribunal of the state' in which the act was committed, or by 'such international penal tribunal as may have jurisdiction with respect to such contracting parties which shall have accepted its jurisdiction.'

Article IX provides that disputes between the contracting parties relating to the 'interpretation, application or fulfillment of the present convention,' shall be submitted to the International Court of Justice at the request of any party to the dispute.

Thus, it will be seen that it is proposed by the action of the President, consented to by two-thirds of the Senators present' when Senate action is taken, to define certain acts, which have traditionally been regarded as domestic crimes, as international crimes and to obligate the United States to provide for their punishment and for the trial of persons accused thereof either in our domestic courts or in an international tribunal.

Treaty-making power is reviewed

"It would seem appropriate, therefore, to review the treaty-making power.

Section 2 of Article II of the United States Constitution authorizes the President by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur.

The power is not one granted by the states. Neither did the powers of external sovereignty depend on the affirmative grants of the Constitution. If they had not been mentioned in the Constitution, they would have vested in the Federal Government as necessary concomitants of nationality. They embrace all the powers of government necessary to maintain an effective control of international relations.¹

"... the external powers of the United States are to be exercised without regard to state laws or policies."²

"... the field which affects international relations is the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority."³

"The treaty-making power is not limited by any express provision in the Constitution. But it does not authorize what the Constitution forbids and its exercise must not be inconsistent with the nature of our Government and the relation between the states and the United States."⁴

¹ See Art. II, § 2 United States Constitution.

² *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 315-318.

³ *United States v. Belmont*, 301 U.S. 324, 331.

⁴ *United States v. Pink*, 315 U.S. 203, 232.

⁵ *Ashura v. Seattle*, 265 U.S. 332, 341; *Holden v. Joy*, 81 U.S. 211, 213; *Quinton v. Riggs*, 133 U.S. 268, 267.

The treaty-making power is not subject to the limitations imposed by the Constitution on the power of Congress to enact legislation, and treaties may be made which affect rights under the control of the states.⁶

Treaty is equivalent to statute

A treaty, entered into in accordance with constitutional requirements, to the extent that it is self-executing, has the force and effect of a legislative enactment and to all intents and purposes is the equivalent of an Act of Congress. In addition to being an international contract, it becomes municipal law of the United States and of each of the states, and the judges of every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.⁷

In the event of a conflict between a treaty made in accordance with constitutional requirements and the provisions of a state constitution or a state statute, whether enacted prior or subsequently to the making of the treaty, the treaty will control.⁸

But, a treaty may be abrogated by the enactment of a subsequent federal statute which is clearly inconsistent therewith.⁹

Thus, it will be seen that it is proposed that we set out on a course, under a power without express limitation and of broad scope, to enact domestic criminal law, without any concurrence by the House of Representatives, the body traditionally regarded as closest to the people.

Moreover, if the offenses involved should be regarded as international in character by Section 8 of Article I of the United States Constitution, Congress has the power 'to define and punish . . . offenses against the law of nations.'

Convention would become supreme law of land

Since the Convention in most respects is self-executing, in those respects, on ratification, it would become the supreme law of the land. That would not be true as to any other contracting party except France and a few other states. Even if non-self-executing, the obligation to implement the Treaty by legislation is as binding as the Treaty itself.

It is one of our fundamental concepts that a legislative body, in the exercise of its power to declare what constitutes a crime, must define it so as to inform persons subject thereto, with reasonable precision, what it intends to prohibit so they may have a certain and understandable rule of conduct and know what it is their duty to avoid. 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'¹⁰

Do the definitions in Articles II and III of the Convention meet that test?

'What is a part of a national, ethnical, racial or religious group—one member, two members, how many?

If an act was done with intent to destroy two members of a group, although actuated by no malice toward the group as such, would that be genocide?

Would it not be more accurate and desirable if the prerequisite intent was defined as an act committed with intent to injure one of the enumerated groups as such, so as to make it clear the act must be directed toward the group as such and not merely at an individual member or members thereof?

'What is meant by mental harm?

Does not complicity mean the act of an accessory, or to aid, abet, assist, or incite genocide?

A person accused of an offense defined by the Convention, if tried by an international penal tribunal, would not be surrounded by the safeguards we accord persons charged with domestic crimes.

Should we ratify Convention with reservations?

In the event we ratify the Convention, should we, by reservation, expressly provide that citizens of the United States and persons within the territorial jurisdiction of the United States, charged with an offense defined in the Convention will be subject to trial and sentence only by a competent judicial tribunal

⁶ *Missouri v. Holland*, 252 U.S. 416, 432.

⁷ See *Valentine v. Neidercker*, 200 U.S. 5, 10; *Whitney v. Robertson*, 124 U.S. 100, 104.

⁸ *Santovincenzo v. Egan*, 234 U.S. 30, 40; *Nielsen v. Johnson*, 275 U.S. 47, 52.

⁹ *Whitney v. Dominguez*, 130 U.S. 238, 247; 52 *Am. Jur. Treaties*, 818 §21; Note 4 *A.R.* 895.

¹⁰ *Connally v. General Const. Co.*, 269 U.S. 385, 391.

of, and sitting within, the United States, vested with jurisdiction over such offense by federal legislation; that a citizen or other person so charged shall be presumed to be innocent until his guilt has been established by lawful evidence beyond a reasonable doubt; that a citizen or other person so charged shall be protected by all the safeguards embraced within the Constitution of the United States, including the rights guaranteed by the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution of the United States, to an accused charged with a domestic crime; and that such citizen or other persons shall not be subject to be charged, tried, or sentenced by any international penal tribunal? Of course, no international penal tribunal has yet been created, and the advice and consent of the Senate would be necessary to subject our citizens to the jurisdiction of such a tribunal should it be created. But should we not endeavor to close the door to the giving of that advice and consent in the future?

"Although the United Nations Charter provides that nothing therein contained shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, since our representatives have participated in the drafting and approving of the Genocide Convention, if it should thereafter be ratified by the United States, would the matters embraced in such Convention be thereby withdrawn from our domestic jurisdiction?

"Should we agree to submit to the International Court of Justice a dispute as to the interpretation, application, or fulfillment of the Convention by us? Suppose a citizen of the United States was charged with one of the offenses defined in the Convention—the group involved being an alien racial group—and tried in a competent tribunal in the United States, and our domestic courts, including the Supreme Court of the United States, should hold the act did not constitute an offense under the Convention. Could the state, of which the alien group were subjects, seek a review as to the interpretation of the treaty in the International Court of Justice? If it could not seek a direct review, could it seek an interpretation by the International Court which would be binding on our domestic courts in the future?

"Should we obligate the United States to undertake to prevent and punish genocide in other states? Such seems to be the import of Article I of the Convention.

"I assume that no one will deny that the acts defined in the Convention as offenses are abhorrent and the purpose to prevent them wholly commendable. The question is as to the method and means to attain that end.

"If genocide and kindred offenses defined in the treaty are in fact international crimes, would not the wise course be to enact domestic legislation under Section 8, Clause 10, Article I of the Constitution of the United States, defining such offenses, and providing for the trial and punishment of persons committing such offenses, in our own domestic courts, where the accused will be guaranteed his constitutional rights and accorded due process under our concept of that phrase? We would thus act our own house in order, would offer the same protection to the accused as one charged with any domestic crime, and would reserve to our own courts the final determination of questions as to the interpretation of the penal statute. To agree, by international convention, to so define, try, and punish persons who commit the offenses which the treaty undertakes to define, would seem to me to wholly fulfill our international obligation, and would avoid many serious questions with respect to the incipient effects of ratification of the Convention on our constitutional and legal system and questions of policy which will arise on a consideration of concurrence by the Senate in the proposed Convention.

(ABA Journal, August-1949, quoted in Genocide Convention, Hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 92-1, March 10, 1971, pp. 8-11)

HUMAN RIGHTS AND INTERNATIONAL LAW

By Mr. Carl B. Rix*

(At the annual meeting of The American Society of International Law held in Washington on April 29, 1949)

Human rights and international law as a composite until recently was a non-existent problem. In *An International Bill of the Rights of Man*, page 5, Prof. H. Lauterpacht says:

"In fact, the individual became only to an imperfect degree the object of the law of nations. Treaties of a humanitarian character were concluded for protecting the individual in some specific spheres, but the fundamental claims of human personality to equality, liberty, and freedom against the arbitrary will

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of the state remained outside the orbit of international law save for the precarious and controversial principle of humanitarian intervention."

In the April 1919 issue of the *American Bar Association Journal*, page 358, Mr. Moses Moskowitz says:

"There is no such thing as recognized human rights in international common law. The idea of affording international protection of certain human rights and freedoms can be realized only within the framework of treaty provisions establishing the rights to be placed under international protection, defining their content, litigations, and prohibitions."

International law, by treaty or otherwise, is not made in the twinkling of an eye or by the demands and ideas of the few. Sufficient time for reasoning and practice has always been a fundamental of international law. Aspirations and alleged necessities for social changes, no matter how meritorious, do not justify tremendous revolutionary changes in a slowly developing structure like that of international law. A heavy burden of proof rests on proponents of those changes, admittedly not to be secured by an evolutionary process of building customary law but by the summary process of contract or treaty law, the purpose of which is to create a code of conduct of individuals and nations for more than a billion of the people of the world of diverse languages, concepts of government, and standards of living.

In this country we had a significant experience with a noble experiment which ended in ignoble failure due to impossibility of enforcement and change of public sentiment. Emotional actions and resulting propaganda must be analyzed and weighed. What changes in existing structures will be effected? It isn't enough to say that there must be a law and then all will be well. Who says it and why, on what authority and experience? Who is to administer this new body of treaty law, what methods of enforcement will be available, what trials for offenders, individual or state? Dr. Jessup, in his book "A Modern Law of Nations," page 186, discusses intervention in civil wars and internal matters and cautions "that international interference in such matters may lead to undesirable domination of the internal situation in a state and be productive of more international friction than it eliminates."

There is a surge throughout the world for freedom of men as individuals, for assurances of such freedom from their governments, of assurances of minorities that great programs of destruction shall not be repeated anywhere in the world, that common action hereafter shall not be wanting in prevention and stopping such things in their tracks. The peoples of many countries, through the treaty of mutual assistance and now the Atlantic Pact, are united in common defense of the gains in self-government they have made. They unite in defense against a system of government which is determined to spread its tentacles of enslavement of freedom of thought and action, against the machinations of 13 men running a government of tyranny and deceit to spread their power over the world. The way of the aggressor will be hard. When the question was asked of American lawyers if they were ready to proscribe aggression in the world, the answer was not expected so soon.

At the same time, in firm belief that the freedom of man cannot be destroyed, many nations of the world move forward on a tremendous campaign for peace in a harassed world, for things of the spirit, for supremacy of the mind of man, for the right of the individual to live his own life. They move forward in a desire of those who have been favored to help those who have not, to exchange of ways and means to higher and better standards of living everywhere. It is always hard to understand altruism but, there it is, creating problems of accommodation with the practical. We come to you as representatives of a great association of men devoting their lives to problems of government and justice, of individual rights, in a spirit of accommodation, if possible, of the conflicts of action to be solved, and solved they must be. As a great leader in the slow, imperfect task of human freedom, this country, as the possessor of a constitutional Bill of Rights, is asked and looked to for assumption of leadership.

In cooperating with this task, problems arise for the people of this country. How can their constitutional structure, their Bill of Rights, be fitted into the developing international picture of human rights without destruction of a cherished system of our division of powers of government, of our ideals and practical necessities? This is the task to which the American Bar Association has set itself and is the reason why we, the common garden variety of American lawyers, come to you—experts in international law.

Among many other questions, we present these for discussion:

1. What will be the probable result of the induction into international law of the general principles of individual responsibility for international law?
2. What is the effect of treaty law as domestic law of the land, as supreme law under the Constitution?
3. Is there no limit to the power of Congress acting under a treaty except that of prohibition in the Constitution?
4. Shall the treaty-making power be used as the basis for enactment of domestic legislation in the United States?
5. What is the effect of provisions in the Charter of the United Nations as to human rights, as a surrender of the provision of article 2 (7), the reservation of jurisdiction as to domestic questions? What will be the effect as to surrender of domestic questions if the Genocide Treaty and a Human Rights Treaty are ratified?
6. Shall the American people, with their guarantees of protection in the trials of individuals not present in other countries, agree to extradition and trials of Americans before foreign or international tribunals for violations of international law?
7. What means are available to fit our structure into the international picture without destruction of our basic principles?

We are not now ready to supply the answers to these questions. We believe that the American people should be fully advised on these matters; that if you, with your knowledge of international and constitutional law, cannot supply the answers, all of us shall devote unremitting time and toil to their solution. We are gratified that the campaign of the American Bar Association to this end, through Judge Hanson and President Holman, is bearing fruit and that sufficient time will be available for full and complete discussion and study.

In the meantime, those questions and others are taken to the lawyers of this country and Canada in a series of conferences of which 12 out of 20 projected in this country have been held. Much of value has been learned, much study by individuals and groups is now under way.

We have before us one signed treaty, that of genocide, to be submitted for ratification. A great treaty on human rights is in process of drafting and we have for study the preliminary drafts of the commission on human rights.

Now, in the limited time available to me, for a quick look at the problems.

I

What will be the probable result of the induction into international law of the general principles of individual responsibility for international law?

Traditional international law is the law of states and their relations to each other, with all enforcement and negotiations in the states alone. Hamilton put it, "The law of sovereign and sovereign." Now there is another concept of individual liability in international law which already appears in four fields:

1. Offenses against the laws of war and other war crimes.
2. The Genocide Treaty.
3. The human rights covenant.
4. The Habana Charter.

Brig. Gen. Telford Taylor has said, in *An Outline of the Research and Publication Possibilities of the War Crimes Trials*, on page 2:

"International penal law—a mere embryo a few decades ago—has developed with phenomenal rapidity. . . . Almost overnight, international penal law has become a living reality."

Again he says, on page 11:

"The war crimes trials, at least in western Europe, have been held on the basis that the law applied and enforced in these trials is international law of general application which everyone in the world is legally bound to observe. On no other basis can the trials be regarded as judicial proceedings, as distinguished from political inquisitions. On any other basis, the trials will become a sorry reproach to those who sponsored them, and will surely have a damaging rather than a beneficial effect in Germany. No task which confronts international lawyers and statesmen today is more important than that of solving the numerous and difficult problems which surround the project of making international law a hard reality throughout the world."

Article IV of the Genocide Treaty provides:

"Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals."

The human-rights covenant is predicated on individual responsibility and will present acute problems in a much wider form. The matter of individual right of petition and responsibility under the covenant has already had lively discussion in the Commission. The problem was sidetracked until the declaration was approved. It will break forth with renewed vigor. The United States, China, and other states propose references of disputes to a committee for opinion and conciliation at the request of states only, thus approving the traditional practice. India asked instantly for the right of petition and inclusion of liability and rights of individuals. France did the same in the memorandum of Dr. Cassin. In that is a suggestion of an attorney general for the United Nations for investigation and prosecution of complaints. Australia presented a plan and a charter of a World Court of Human Rights.

My own study convinces me that the foregoing statements are substantially correct. I cannot believe that individual responsibilities and liabilities do not create correlative rights and privileges—in the instant matter to an utterly unknown degree and extent.

II

The full impact of the proposed treaties of genocide and human rights in the United States is revealed in the next question: What is the effect of treaty law as domestic law of the land, as supreme law under the Constitution?

In your discussions at the meeting last year of the effect of customary international law as domestic law, Dr. Hyde referred several times to the question of treaties as domestic law under the Constitution of the United States, but the subject was not pursued. It took an English lawyer, Professor Lauterpacht, to make clear to us anew our constitutional position in these words (p. 170):

"The distinction between 'domestic law' and 'constitution' is deliberate. As to the first, it is clear that in the absence of a special enactment or declaration by the National Legislature, the Bill of Rights, even when ratified, would not, in most countries, necessarily become part of the municipal law of states ratifying it. In the United States, article VI (2) of the Constitution provides that all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The United States, it will be noted, is for individual liability in genocide and for the traditional state liability and rights in human rights. Where do we go from here?

We speak of individual liabilities only—are there correlative individual rights? Again I quote Dr. Jessup, page 137, who has definite views:

"With the acknowledgment of the individual as a person of international law, it will no longer be necessary to speak solely in terms of rights of states when dealing with privileges and rights conferred by commercial treaties and other treaties dealing with economic and social rights. States may still conclude treaties on behalf of their nationals; they may be, so to speak, convenient instruments for collective bargaining. The state may retain its own right to proceed against another state in case of a treaty breach, but the individual citizen may likewise have his own procedures for vindication of his own rights. Thus the infringement of a trade-mark or patent under the protection of an international convention may be the basis for a cause of action in an appropriate forum by the individual possessor of the right, which he would derive immediately from the convention and not mediately through some national law passed for the implementation of the treaty. Procedurally speaking, it may prove advantageous to have suits instituted first in national courts, but there might be subsequent review by an international tribunal, as already discussed in claims cases. Likewise the individual, black or white, would have a cause of action in case he or she were the victim of a breach of an international slavery convention. More presently, the individual businessman, air line, or steamship company, would not have to wait on the slow wheels of diplomacy to secure damages for a violation of rights under a bipartite treaty of commerce or a multi-partite convention concerning commerce and navigation."

In a Progress Report on Human Rights, Department of State Bulletin, August 8, 1948, by James Pomeroy Hendrick, legal adviser to the chairman of the Commission on Human Rights, we find:

"If the covenant is to obtain widespread adherence, it is essential that its provisions should not interfere unduly with the domestic jurisdiction of member

states. The theory of the covenant in itself is revolutionary; an undertaking by international treaty to insure certain rights which have traditionally been regarded as being solely of national concern. . . . To allow an individual to appeal from a decision of his country's last resort is a serious step; yet this might be the consequence of recognizing the right of individual petition."

"To that article the courts of the United States have given a generous interpretation, amounting occasionally to an attribution to a treaty of an effect dangerously approaching that of a constitutional amendment. But in other countries a duly ratified treaty is not part of municipal law until it has been made so by an express act of the national legislature. In Great Britain treaties affecting private rights—and these include practically all treaties—do not become the law of the land unless they have been made so by a special act of Parliament."

Since the above was written in 1944, to a limited degree the same effect is had in France. Involved herein is the difficult question of a treaty which is self-executing in whole or in part. The mere fact of the necessity of implementation by legislation, such as the definition of crimes under international law and fixing penalties, does not make a treaty non-self-executing. It seems to be plain that the essential portions of the genocide treaty and the proposed human rights treaty are self-executing, in spite of the note of the drafters of the latter to the contrary. Only clear intent in the treaty itself can prevent the automatic operation of the Constitution of the United States. Thus there may be created, as law, a third body of treaty law in this country with no constitutional basis whatsoever, of equal dignity with our Constitution, as supreme law of the land, superseding all State constitutions, decisions, and laws of the States covering the same subjects, and probably superior to all prior enacted laws of Congress on the subject. Of course, it is no answer that subsequently enacted laws by Congress may abrogate or terminate a treaty. This country is not in the habit of ratifying treaties with the intention of repudiation. The effect in this country of a ratified treaty of human rights and, in a limited degree, the genocide treaty, in a field which has been almost exclusive in the States, is so far-reachinging in its consequence that the word revolutionary is not fully descriptive. Again, it is no answer to say that the treaty is non-self-executing. Under international law the duty to implement a treaty fully and completely is of the same high moral order as the obligation of the treaty itself. It is asserted that Congress has never failed to so implement a treaty.

The case cited by Professor Lauterpacht is the famous migratory bird case, *Missouri v. Holland* (252 U. S. 416), in which Leviathan, with deep concern for the food supply of wild duck for a suffering people, blithely asserted that there is no limit in the United States to the treaty-making power and legislation enacted thereon unless it is prohibited by the Constitution.

The problem is aggravated by the recent series of cases in the Supreme Court which deal with the power of Congress to appropriate entire fields of legislation to the exclusion of the States. I leave to your imagination as to what would happen in the field of administration of municipal law if subversive elements should teach minorities that the field of civil rights and laws had been removed to the field of international law, with the consequences outlined by Dr. Jessup, as quoted herein.

The paucity of discussion of these constitutional features is difficult to understand. Is it possible that discussion would not comport with propaganda?

III

Is there no limit to the power of Congress acting under a treaty except that of prohibition in the Constitution?

This subject was discussed fully at the annual meeting of the society in 1929. In spite of the sweeping statements in *Missouri v. Holland*, there is highly respectable authority that there are sharply defined limits.

Illustrative are these cases: *U. S. v. Pink* (315 U. S. 203); *Asakura v. Seattle* (298 U. S. 332); *Holden v. Joy* (84 U. S. 211); *Gregory v. Riggs* (133 U. S. 258); *U. S. v. Belmont* (301 U. S. 321).

No treaty has ever been held unconstitutional in any court, Federal or State, in the United States.

In the 1929 meeting Chief Justice Hughes, in closing the discussion, said in part:

"So I come back to the suggestion I made at the start, that this is a sovereign untow; from my point of view the Nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our interna-

tional relations, unless there can be found some express prohibition in the Constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments. But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power."

IV

Shall the treaty-making power be used as the basis for enactment of domestic legislation in the United States?

It would seem that the wise words of Chief Justice Hughes just given would be sufficient answer to this question.

From part 10 of the report of the Committee on Civil Rights, appointed by the President, comes this sinister and cynical suggestion following a full discussion of the restricted limits of Federal power of legislation in the field of civil rights:

"10. Power derived from the treaty clause in article II, section 2 of the Constitution, to protect civil rights which acquire a treaty status.

"In its decision in *Missouri v. Holland* in 1920, the Supreme Court ruled that Congress may enact statutes to carry out treaty obligations, even where, in the absence of a treaty, it has no other power to pass such a statute. This doctrine has an obvious importance as a possible basis for civil-rights legislation."

This is the report the President advised us to read as a bedtime story. The road to Federal absolutism is being made very, very easy.

V

What is the effect of provisions in the Charter of the United Nations as to human rights, as a surrender of the provisions of article 2 (7), the reservation of jurisdiction as to domestic questions? What will be the effect as to surrender of domestic questions if the genocide treaty and a human rights treaty are ratified?

The necessity for extreme care and skill in drafting a treaty is shown by the construction and interpretation of the language used in the Charter of the United Nations as to human rights.

It will be assumed that you are entirely familiar with articles 1-3, 55, 56, and 62 of the Charter, which refer to human rights.

Note how carefully those provisions call for promoting, assisting, encouraging, recommending, the cause of human rights, without the creation of any contractual liability for recognition of human rights by any state.

But, as we have been reminded by high judicial authority, plain words do not always mean what they say. The reservation of domestic questions, known as article 2 (7), is perfectly plain and concise. Certain it is that when the charter was ratified by the United States and other countries, full force and effect was given to that reservation of domestic questions. Full assurances on that point were given to the Senate of the United States and the people of this country by the Secretary of State and the President.

It may be of interest to know that in the 1947 meeting of the International Law Association at Prague, a resolution was adopted to set up committees for studying and reporting to the next conference on the legal effects of the Charter in relation to article 2 (7). A distinguished committee, headed by Lord Porter, was set up with Professor Lauterpacht as rapporteur. The report to the human rights committee of the International Law Association at the Brussels (1948) conference is now available for study, and to a layman in this field it is of startling import. Distinguished scholars from all parts of the world sent their comments and observations. A substantial majority of the members of the committee who sent in their comments and observations expressed general agreement with the preliminary report. Comment is made that Dr. Jessup sent a personal note showing on which points the preliminary report differs from the official attitude of the United States. Professor Eagleton expressed a view different from that propounded in the report with regard to the nature of the provisions of the Charter of the United Nations in the matter of human rights and fundamental freedoms. In his view the relevant provisions of the Charter do not

impose upon the members of the United Nations the legal obligation to respect human rights and fundamental freedoms.

Now for some of the surprising conclusions.

"The provisions of the Charter in the matter of human rights and fundamental freedoms express legal obligations binding upon the individual members of the United Nations" (p. 9).

"As a matter of wider principle, it is probably legitimate to assert that the duty of the state to promote the observance of and respect for human rights extends to the obligation to prevent such denial, from whomsoever emanating, of human rights and fundamental freedoms" (p. 21).

The report then passes to the position of the individual under the Charter:

"Finally, one of the results of the provisions of the Charter in the matter of human rights and fundamental freedoms is to effect a far-reaching change in the position of the individual in international law. They transfer the inalienable and natural rights of the individual from the venerable but controversial orbit of the law of nature to the province of positive law, of international law" (p. 22).

Having reached these conclusions as to the binding effect of the provisions as to human rights in the Charter and the position of the individual under it, the report at length argues against the declaration and a covenant as retrogressive steps because the favorable situation under the Charter will be greatly weakened.

As to the difficulties of draftsmanship this is said:

"Any attempt to draft them in the hurried atmosphere of conferences, through a procedure of voting and rapid adoption or elimination of proposals made there, must result in instruments the clauses of which will be often prolix, deficient in form and substance, and lacking in organic unity. . . . The task of drafting an international bill of rights is confronted with all the difficulties which beset the formulation of the most intricate clauses of the constitution of a State, namely, those in the sphere of determining the fundamental rights and duties of the individual and his relation to the State. On the international plane these difficulties are considerably greater" (pp. 40 and 41).

Then follows this discussion:

"Undoubtedly after months of arduous work, such as the Commission on Human Rights has devoted to the subject, there is a tendency, natural in the circumstances, to adopt an instrument showing some results of the prolonged effort. Any such tendency, which may be the product not of conviction but of fatigue, must be resisted. . . . To attempt, in the political and psychological atmosphere of international relations following upon the Second World War, to give final shape to a fundamental and historic instrument the essence of which must be some distinct measure of surrender of exclusive rights of sovereignty, may mean serious and irreparable injury to the cause of human rights. This is a case in which delay may be preferable to fostering the illusion of achievement" (p. 55).

If these comments are compared with the demands for immediate action expressed by Mr. Moskowitz in the American Bar Association Journal, and the reply of President Holman, it must be apparent that repeated demand of the House of Delegates, on the advice of President Holman and Judge Ransom for sufficient time in the preparation of the covenant and its study by the citizens of this country, are completely justified.

Then follows a still more remarkable position:

"The United States was to a large extent responsible for the idea of a declaration which is neither binding nor enforceable and which is to be accompanied or followed by a binding convention—provided there is a sufficient number of states ready to accept it. The United States has opposed what must be regarded as an indispensable feature of an effective protection of human rights, namely, the recognition of the right of petition by private individuals and groups. . . . The historic part which the United States, since the Declaration of Independence and its own Bill of Rights, has played in promoting human freedoms, as well as its rapidly increasing part in international cooperation, permit the expectation that that country may yet make a decisive contribution to an effective international protection of the rights of man. In the meantime it is preferable to leave to the forces of democracy in that country the opportunity to vindicate fully through the slower processes of education and persuasion the idealistic and libertarian tradition of its people in relation to human rights" (p. 54).

In an editorial in the Journal of the Association, Judge Hudson told his respects to the contention that positive law as to human rights was created by the Charter in spite of article 2 (7):

"It is difficult to conceive of the possibility of making substantial progress in the development of international law unless a scrupulous respect obtains for the integrity of international instruments. Yet a tendency now seems to prevail in some quarters to undermine that respect by torturing the meaning of great international instruments and by forcing them to serve purposes for which they were never designed, purposes at variance with the desires entertained by Governments when the instruments were brought into force.

"The usefulness of the Charter of the United Nations should not be misconceived. The Organization will endure only if its provisions are respected. A frame for a picture must not be mistaken for the picture itself, and the United Nations may need to be protected against some of its more ardent friends.

"When reforms cannot be achieved through agencies of local government, it is often a temptation to seek to have them ordained from above and afar. Problems take on an illusory guise of simplicity if the forum of their consideration can be shifted to a distant state or national capital. And a failure there easily begets a further temptation to seek their solution by international action. Perhaps such progression is not to be condemned, but it should not be permitted to place strain on existing international legislation.

"If governments cannot have confidence that the instruments by which they bind themselves will not be made to serve unintended purposes, if respect is not paid to the terms and tenor of the obligations imposed by such instruments, the result may be a reluctance to assume further commitments and the progressive development of international law may be seriously retarded. An important function of the United Nations might thus be frustrated." (The American Journal of International Law, vol. 42, No. 1, pp. 105, 107, 108.)

VI

Shall the American people, with their guarantees of protection in the trials of individuals not present in other countries, agree to extradition and trials of Americans before foreign or international tribunals for violations of international law?

With the possible exception of divided opinion as to prosecution and trial for war crimes, our experience in the 12 conferences with lawyers in various States furnishes an emphatic "no" to this question. It is said by lawyers participating in the war trials that there were many privileges of the accused in criminal trials under our system which were not present in those trials. Add to that the problems of extradition, language, procedure, and cost of defense, and it is easy to see why American lawyers should be of decided opinions on the subject. The difficulty in securing approval of the United States for the World Court may point the way for our representatives in the United Nations on considering proposals for other international tribunals.

Judge Orle L. Phillips phrased this question in connection with the Genocide Treaty thus:

"With respect to article VI, in the event we ratify the convention, should we, by reservation, expressly provide that citizens of the United States and persons within the Territorial Jurisdiction of the United States, charged with genocide, will be subject to trial and sentence only by a competent judicial tribunal of and sitting within the United States, vested with jurisdiction over such offense by Federal legislation; that a citizen or other person so charged shall be presumed to be innocent until his guilt has been established by lawful evidence beyond a reasonable doubt; that a citizen or other person so charged shall be protected by all the safeguards enshrined within the Constitution of the United States, including the rights guaranteed by the fourth, fifth, sixth, and eighth amendments to the Constitution of the United States, to an accused charged with a domestic crime; and that such citizen or other person shall not be subject to be charged, tried, or sentenced by any international penal tribunal?"

VII

What means are available to fit our structure into the international picture without destruction of our basic principles?

Must we have a constitutional amendment to put the United States on a parity with other nations on the effect of treaties as domestic laws? If, from the many fields of effort of the United Nations more treaties covering domestic questions are offered, such action may become absolutely necessary. If not, the Senate of the United States may be obliged to refuse ratification.

The reservation route did not work in the case of the League of Nations. The subject must be explored and it must be understood by the people that reservations may be necessary in order to secure adjustment of the covenant of human rights and other treaties to our Constitution.

Sympathetic advice and counsel, based on careful continuing study of the subject and the work of the Commission on Human Rights, is called for. The American Bar Association will continue to function in this way, broadening its work as more citizens become familiar with international law. Education and more education is the order of the day.

By trial and error the United Nations will find its way and gradually its successes will be greater than its inevitable failures.

If it is thought that the difficulties have been overemphasized in this address, let me remind you that only if the tremendous size of the job is understood can any progress be made. It is no time for orations and emotions on human rights, for propaganda and recitals of wrongs and hardships. Professor Lauterpacht, one of the greatest scholars of the subject of human rights, devotes four pages of his book to a recital of the difficulties and the problems to be faced. He then makes these statements:

"Yet, when all has been said, the fact remains that any attempt to translate the idea of an international bill of the rights of man into a working rule of law is fraught with difficulties which disturb orthodox thought to the point of utter discouragement" (p. 9).

This, from his book, may be the lesson for all of us:

"In view of all these difficulties, it may be felt that indulgence in the idea of an international bill of the rights of man is a regrettable dispersion of effort, of the futility and utter impracticability of which the student of law and politics ought to warn both governments and public opinion at large. It may be his business to do so. At the same time, however, it is his duty to assist in uncovering the hidden springs and the enduring core of the matter—a matter which is the abiding theme of political and legal thought throughout the ages. It is possible that in the contemplation of the continuity of ideas and aspirations on the subject we may find assistance in approaching the solution of that persistent problem of law and government" (p. 15).

(From the Congressional Record, July 26, 1949, p. A 5018, quoted in Genocide Convention, Hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 81-2, January 23, 24, 25, and February 9, 1950, pp. 177-185.)

THE GENOCIDE CONVENTION

By George A. Finch*

The Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations in Paris on December 9, 1948, and signed on behalf of the United States 3 days later, is now before the

United States Senate for consideration.¹ It is expected that the Committee on Foreign Relations will hold hearings before making its report to the Senate.

The convention was the subject of thorough consideration by the American Bar Association at its seventy-second annual meeting in St. Louis, September 5-9, 1949. It came before the association through two channels, the association's special committee on peace and law through United Nations and the association's section of international and comparative law. Both the special committee and the section agreed that the convention should not be ratified by the United States as submitted. For reasons stated below, the special committee did not suggest reservations, but the section recommended a series of reservations which it thought would cure the convention's defects. The house of delegates of the association appointed a committee of six, not including any members of the special committee or the section, to consider both reports and make recommendations to the house. This action was taken in the hope of avoiding extended debate, but that expectation proved to be in vain. Delegations from the special committee and the section appeared before the house committee and presented and argued their views during the whole of an afternoon. After they retired the house committee proceeded to make its recommendations to the house of delegates in the form of a resolution. The special committee on peace and law through United Nations accepted the resolution, but it was unacceptable to the representatives of the section, who sought to substitute their own recommendations for the house committee resolution when the matter came before the house of delegates as a special order on the morning of September 7. A full-dress debate ensued, lasting the entire morning and well into the afternoon. Attempts to cut off debate were unsuccessful and everyone who had anything to say was given the opportunity to say it, including Hon. Philip P. Perlman, Solicitor General of the United States, who supported the section report, and Hon. Frank B. Holman, the president of the association, who supported the house committee report. When the vote was taken, the section's substitute was rejected and the house committee report adopted by an overwhelming vote. The official action of the American Bar Association is recorded in the resolution adopted, which reads as follows:

"Be it resolved, That it is the sense of the American Bar Association that the conscience of America like that of the civilized world revolts against genocide (mass killing and destruction of peoples); that such acts are contrary to the moral law and are abhorrent to all who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnical, racial, religious, or political groups to which they belong; that genocide as thus understood should have the constant opposition of the government of the United States and of all its people.

"Be it further resolved, that the suppression and punishment of genocide under an international convention to which it is proposed the United States shall be a party involves important constitutional questions; that the proposed convention raises important fundamental questions but does not resolve them in a manner consistent with our form of government.

"Therefore, be it resolved, that the convention on genocide now before the United States Senate be not approved as submitted.

"Be it resolved further, that copies of the report of the Special Committee on Peace and Law Through United Nations and the suggested resolutions from the Section of International and Comparative Law be transmitted, together with a copy of this resolution, to the appropriate committee of the United States Senate and House of Representatives.

The views of the special committee on peace and law through United Nations, whose recommendations were upheld by the American Bar Association, can be adequately obtained only by reading its printed report of 63 pages. During the preceding year regional conferences of the bar were held in 16 cities of the United States, and the committee's report expressed the consensus of those meetings.

¹ Senate Executive O. 81st Cong., 1st sess. Genocide is declared to be a crime under international law whether committed in time of peace or in time of war. The crime is defined as the commission of certain acts "with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such." Five categories of criminal acts are enumerated: Killing or causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, prevention of birth within the group, and forcibly transferring children to another group. Made punishable are acts of genocide thus defined as well as conspiracy, public incitement, attempts and complicity to commit them. Persons committing any of these acts are punishable "whether they are constitutionally responsible rulers, public officials, or private individuals."

*Editor-in-chief, American Journal of International Affairs.

The criticism of the convention touches both the basic principles upon which it was drafted and the procedure for enforcing it. Although the convention purports to deal with the repetition anywhere of the shockingly atrocious crimes against humanity perpetrated by Nazi Germany, it fails essentially to do so. Its approach is that of individual crime and not of persecutions instigated by governments. It provides no international court before which governmental transgressions of the international law declared in the convention may be challenged, but relies for the enforcement of that international law upon the punishment of individuals by national courts. It foresees the eventual establishment of an international court, but for the purpose of trying individuals.

It was conceded by all in the debate before the American Bar Association that the Genocide Convention should deal only with mass killings and destruction of peoples which can only happen with official approval or complicity. One of the reservations proposed by the section sought to amend the convention in this respect by limiting its application to acts which directly affect thousands of persons. How can it be expected that a government engaged in such a policy will voluntarily turn over its officials or citizens to any other government or international court for punishment for carrying out that policy? To take the accused by force would require an act of war. The Genocide Convention is an attempt to carry over into time of peace the so-called Nuremberg principle under which captured enemies were held personally liable for acts of aggression and crimes against humanity; but the Nuremberg Tribunal had the physical custody of the persons whose condemnation was demanded. In the debate at St. Louis the question remained unanswered: How is an international tribunal or foreign national court to obtain custody in time of peace of an accused genocidist?

The convention is selective among the groups it would protect in whole or in part. Those singled out for preferred consideration are national, ethnical, racial, and religious groups as such. Political and economic groups were apparently not considered as needing or worthy of protection. Pressure is being brought to bear for the speedy ratification of the Genocide Convention on the ground that genocide is being committed behind the iron curtain; yet the Genocide Convention as submitted would not apply to many such cases. The Soviet Government and its Communist satellites, should they accept the convention, which they have not done up till now, may liquidate property owners and others who believe in private enterprise on the ground that they are political enemies of the state and therefore are not covered by the convention. The same action may be taken against any national, ethnical, racial, or religious group, and the application of the convention to them avoided by the claim that they are being proceeded against not as members of one of these groups as such, but as enemies of the state.² The religious persecutions which are taking place in Czechoslovakia, Hungary, and Bulgaria on the grounds that the clergy are enemies of the state would be apt examples of the meaninglessness of this convention in such cases.

As pointed out in the report of the committee on peace and law through United Nations, what is left of the convention "is a code of domestic crimes which are already denominated in all countries as common law crimes." These the convention undertakes to make international crimes. To reach agreement on this basis the convention compromises the system of constitutional law prevailing in the United States. The protection of personal rights is vested principally in the States of the American Union. In certain matters there may be concurrent Federal jurisdiction. By ratification of the Genocide Convention as submitted, it will become the supreme law of the land and displace State constitutions and laws wherever they may conflict with the provisions of the convention. Moreover, under the holding of the Supreme Court in the case of *Missouri v. Holland*,³ the conclusion of a treaty by the Federal Government confers upon it authority in fields of action reserved to the States which the Federal Government would not have without such a treaty. The ratification of the Genocide Convention as submitted would therefore confer upon the Federal Government a large area of jurisdiction which it does not now possess under the Constitution.

In the debates on the Genocide Convention which took place in the section of international and comparative law at St. Louis, former Gov. Harold E. Stassen suggested the possible necessity, in order that the United States might be placed

² The American Jewish League Against Communism recently sent a letter to the Secretary General of the United Nations documenting a previous charge that "400,000 Jews were deported from the Ukraine and White Russia to Archangel and Siberia, because they were considered too pro-democratic to be left on the Soviet borders in case of possible war" (New York Times, September 15, 1949, p. 24).

³ 252 U. S. 416.

on a plane of equality in international cooperation, of amending the United States Constitution so that treaties shall not become the supreme law of the land unless and until they are implemented by an act of Congress. It is understood that, with the exception of France, all other states require legislative implementation to give treaties the effect of law. The course suggested by Mr. Stassen might remove that particular constitutional difficulty. It would not meet the serious objection to proposals to amend the Constitution through the treaty-making power instead of through the means provided in the Constitution itself.

Great stress was laid in the debates at St. Louis upon the need of upholding the Government's policy of cooperation with the United Nations. The American Bar Association established its special committee on peace and law through United Nations to promote such cooperation, and the duty to do so is reiterated in its present report. The committee finds its duty also to point out that nothing contained in the Charter of the United Nations "shall authorize [it] to intervene in matters which are essentially within the domestic jurisdiction of any state" (art. 2, par. 7). When the Government of the United States accepted the compulsory jurisdiction of the International Court of Justice under article 36 of the statute, the Senate attached the Connally reservation which retained for the United States the determination of whether or not a matter is within its domestic jurisdiction. The Genocide Convention as submitted bypasses this reservation, as well as the Vandenberg reservation relating to the interpretation of multilateral treaties, and confers jurisdiction upon the International Court of Justice in all disputes relating to the interpretation, application, or fulfillment of the convention at the request of any party to the dispute (art. IX).

It should be remembered in this connection that, according to an advisory opinion of the Permanent Court of International Justice, a matter solely within the domestic jurisdiction of a state becomes a matter of international concern when a treaty is entered into on that subject.⁴ This principle of international law must not be overlooked if we are to maintain the internal enforcement of our constitutional rights without risk of alien interference or submission to an international appellate jurisdiction.

The proposed Covenant on Human Rights was included in the subjects covered in the reports submitted to the American Bar Association. A completed covenant was not before the association and no discussion took place. The report of the committee of the house of delegates on this subject was unanimously adopted as follows:

"Resolved, That the Special Committee on Peace and Law Through United Nations and the Section of International and Comparative Law be authorized in response to the request of the State Department of the United States, to transmit to it the written reports of the Special Committee and the Section and such other comments on the proposed Covenant on Human Rights as they may deem appropriate; also, to transmit such comments as they may have upon the Covenant to the appropriate authorities of the United Nations."

The undersigned, who is a member of the special committee on peace and law through United Nations of the American Bar Association and also of its section of international and comparative law, deeply regrets that the United States did not hold to the position with which it started to negotiate the Genocide Convention, namely, that the crime of genocide properly defined is inherently one committed at the instigation or with the complicity of the state. He also regrets the vain reliance placed upon the unrealistic and impracticable attempt to apply under the conditions existing in the world of today the concept that advance in the development of international law can be achieved only by making individuals the direct subjects of that law. As was pointed out in the debates at St. Louis, such a theory can be made effective only through the establishment of political institutions with power to take custody of offenders. Such institutions do not now exist, and the Genocide Convention makes no provision for them. In a recent address, Ambassador Warren R. Austin, Chief of the United States Mission to the United Nations, discussed proposals to transform the United Nations into a "world government" whose "laws shall govern individuals as well as states." He asked: "What will be the dividing line between the jurisdictions and judicial powers of the world government and the several states? Is it as simple a problem as that of the United States, which required a civil war, and repeated judicial decisions to determine?" He answered these questions as follows: "We should pause in contemplation of the risk of seeking to estab-

⁴ Advisory Opinion No. 4, Tunis-Morocco Nationality Decrees. Hudson, World Court Reports, vol. 1, p. 146; at p. 150.

lish any world government now. We must deal with the world we have and the tools we have." He was persuaded by experience that such an agreement cannot be had "at this time or within the predictable future."²

It is no answer to argue that a state cannot be haled before an international court for violating international law. If that were true, the world might just as well give up all hope of preserving peace based on law and justice—but it is not true. States have been brought before international tribunals for violations of international law many times in the past, i. e., the Alabama Tribunal at Geneva. As the undersigned has said on other occasions, a structural defect in the United Nations Charter is its failure to provide for the determination of acts of aggression by the International Court of Justice at The Hague. For the same reason, genocide should be defined to include primarily acts emanating from governmental policy or complicity for which the offending government should be made answerable before an international court of justice. Such jurisdiction would not involve war any more than the submission to the court of any other subject of international dispute. We would at the least have a judgment at the bar of public opinion, and have available many sanctions short of war. If national governments wished to add the sanctions of their own law and courts by providing for the punishment of persons within their jurisdiction who might in some way be guilty of or implicated in such crimes, so much the better. The special committee included in its report the suggestion of Judge Orle L. Phillips, of the United States Circuit Court of Appeals at Denver, a member of the committee, that the wiser course would seem to be, if the offenses defined in the Genocide Convention are in fact international crimes, to enact domestic legislation under section 8, clause 10, article I of the Constitution of the United States, which expressly confers upon Congress "the power 'To define and punish . . . offenses against the law of nations.'"

The special committee in peace and law through United Nations made earnest efforts to formulate reservations which would make the Genocide Convention acceptable as creating international obligations for the United States, and at the same time meet the constitutional situation in this country. This the committee was unable to do. It could not see that the section on international and comparative law had been any more successful in drafting the reservations it proposed. The special committee felt that the constitutional questions raised by the convention could only be properly solved by action of both Houses of Congress, and not by the Senate alone. It was for this reason that the American Bar Association directed that copies of the reports submitted be transmitted to the appropriate committees of both the Senate and the House of Representatives.

² Address at Lenox, Mass., August 12, 1940. Department of State Bulletin, vol. XXI, No. 530 (August 20, 1940), p. 283.

³ The commercial treaty of 1832 between the United States and Russia was terminated by the United States on January 1, 1913, following a resolution adopted by the House of Representatives on December 13, 1912, that Russia had violated the treaty by refusing to honor passports duly issued to American citizens of the Jewish race or religion. The House resolution declared: "That the people of the United States assert as a fundamental principle that the rights of its citizens shall not be impaired at home or abroad because of race or religion; that the Government of the United States concludes its treaties for the equal protection of all classes of its citizens, without regard to race or religion; that the Government of the United States will not be a party to any treaty which discriminates between American citizens on the ground of race or religion." For further information on this incident, see this Journal, vol. 6 (1912), p. 180.

⁴ See American Bar Association Journal, August 1940, p. 625.

(From the American Journal of International Law, October 1949, quoted in Genocide Convention, hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 81-2, January 23, 24, 25, and February 9, 1950, pp. 188-192.)

REPORT OF THE SPECIAL COMMITTEE ON PEACE AND LAW THROUGH
THE UNITED NATIONS

ACTION OF HOUSE OF DELEGATES

The chairman of the special committee moved the adoption of the committee's recommendations 1 and 2 that the Genocide Convention, as submitted, be not ratified by the United States. The special committee of the house of delegates, appointed to consider these recommendations, and a resolution dealing with the same subject proposed by the section of international and comparative law, then proposed a substitute resolution for the resolutions of the special committee and the section. The chairman of the section then moved the adoption of the section's resolution approving a ratification of the Genocide Convention with reservations. After extended debate, the section's resolution was put to a vote

and was rejected. The substitute resolution of the special committee of the house was then put to a vote and was adopted as follows:

"Be it resolved, that it is the sense of the American Bar Association that the conscience of America like that of the civilized world revolts against Genocide (mass killing and destruction of peoples); that such acts are contrary to the moral law and are abhorrent to all who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnical, racial, religious or political groups to which they belong; that Genocide as thus understood should have the constant opposition of the government of the United States and of all its people."

"Be it further resolved, that the suppression and punishment of Genocide under an international convention to which it is proposed the United States shall be a party involves important constitutional questions; that the proposed convention raises important fundamental questions but does not resolve them in a manner consistent with our form of Government."

"Therefore, be it resolved, that the convention on Genocide now before the United States Senate be not approved as submitted."

"Be it resolved further, that copies of the report of the Special Committee on Peace and Law Through United Nations and the suggested resolutions from the Section of International and Comparative Law be transmitted, together with a copy of this resolution, to the appropriate committees of the United States Senate and House of Representatives."

I. FOREWORD

At the midwinter meeting in Chicago, in February of this year, two resolutions were adopted by the house of delegates, each requesting of our Government adequate time to study—first, the proposed International Convention on Human Rights, then in draft form and proposed to be acted on by the General Assembly of the United Nations at its May 1949 meeting, and second, the Genocide Convention which had been approved by the United Nations Assembly and was then ready for submission to the United States Senate.

As a result, we think, of such action by the house of delegates, implemented by the efforts of the president of your association, the United Nations Commission on Human Rights, after preparing a revised International Covenant on Human Rights in a 6 weeks' session at Lake Success ending on June 20, 1949, determined to delay action and transmitted the draft covenant and measures for implementation to member governments for comment. The Commission has "fixed January 1, 1950, as the final date on which all proposals concerning these drafts should be received by the secretariat. The Commission will reconvene for a sixth session early in 1950 to revise the documents in the light of the comments received from governments, which when completed at the 1950 session, will be forwarded to the Economic and Social Council and then to the General Assembly for its consideration in the fall of 1950" (XXI State Department Bulletin No. 523, July 11, 1949, p. 3).

This latest draft of the proposed International Covenant on Human Rights is attached to this report as appendix A.

The genocide pact which was adopted by the General Assembly of the United Nations in Paris on December 10, 1948, and signed on behalf of the United States on December 11, 1948, was on June 16, 1949, transmitted by President Truman to the United States Senate for consideration, with the recommendation, based on the approval of the State Department (which contains a reservation of one "understanding"), that the Senate advise and consent to ratification of the convention.

The Genocide Convention was referred to by the Senate to its Committee on Foreign Relations, which has the proposed treaty under study and has indicated that it expects to hold hearings.

The convention, the President's message of transmittal, and the report by the Acting Secretary of State to the President, incorporated in the message of transmittal, are submitted with this report as appendix D.

During the interval between the midwinter meeting of the house of delegates in February and the preparation of this report, under a grant for the activities of the committee by the Carnegie Endowment for International Peace and the board of governors of the American Bar Association, there have been held regional conferences of members of the bar in many cities of the United States to study and consider the proposed International Covenant on Human Rights and the

Genocide Convention, and germane legal and constitutional questions. Two meetings have been had with the Canadian Bar Association. Meetings were held in the following cities: Boston, Omaha, Tulsa, Chicago, Detroit, Milwaukee, New Orleans, Dallas, Savannah, Seattle, St. Louis, Cleveland, Denver, San Francisco, Birmingham, and Minneapolis.

The moderators were President Frank B. Hohmann, Judge Manley O. Hudson, Judge Orle L. Phillips, George A. Finch, Alfred J. Schweppe and Carl B. Rix. The educational value of the conferences is pronounced and much of value was learned from them. Every effort was made to include various shades of opinion. It is regretted that the conference type of meeting must be of a restricted number. It is impossible in the limits of this report to submit the consensus of the meetings. In the main this report reflects the consensus. For use in the conferences Judge Hanson prepared a booklet, "Documents for Study", containing the essentials for study of the constitutional problems, the drafts of treaties, and other valuable information. A number are available for distribution and an additional supply may be printed. The work has spread and bar associations have fostered local meetings. This work should be greatly extended and should be embraced in all programs of advanced legal education. The address of the chairman, at the annual meeting of the American Society of International Law, on Human Rights and International Law, has been printed in the July number of the Journal of the American Bar Association and in the Congressional Record, July 26, 1949, p. A5018. An article by Judge Orle L. Phillips on the Genocide Convention appears in the August issue of the Journal page 623. These should be read in connection with this report.

II. THE NEW CONCEPT

At a time in the history of the world when economic conditions, resulting largely from two devastating wars, are forcing nations to demand sacrifices of their individual freedoms to conform to Socialist states or alien ideologies, the same peoples are being asked to adjust themselves to revolutionary changes in their relations with their own people and the people of other nations. It does not seem to be enough that they should be led by example and teaching to new ways of conduct. Under international codes of conduct called treaties they are to accept the changes by law. Government by treaties is the new concept.

Wherever possible, trials before international courts for violations are demanded and, failing that, great bodies of domestic laws creating new rights and crimes are to be provided and enforced by the states. All this is under the claim that individual acts and conduct menace the peace and security of the world.

Peoples who do not know the meaning of freedoms are to be metamorphosed into judges of the freedoms of others. A common pattern is to be set for billions of people of different languages, religions, standards of living, culture, education, and mental and physical capacity. A few people, with beliefs utterly foreign to each other, meet, debate, and by majority vote seek to determine how the people of the world shall live on a common pattern. To bring some people to a higher standard, those far above those standards, under the guise of precarious sacrifice to the common good, are to accept the mediocrity of the average. Are the people of the United States ready for such sweeping changes?

From the new draft declaration of the Rights and Duties of States we quote article 6:

"Every state has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms and without distinction as to race, sex, language or religion."

Judge Manley O. Hudson, Chairman of the Commission, stated that he voted against the draft declaration because the provisions of article 6 went beyond the Charter of the United Nations and beyond international law at its present stage of development. American Bar Association Journal, August 1949, page 689.

In the past 10 years strong currents of opinion have developed to substitute the concept of the state as the creator and enforcer of international law by a concept under which the individual will supplant the state in that role, with individual liability for it and corresponding privileges and rights of an unknown extent. Do the people of the United States or world know anything about these fundamental changes? Have they had any choice in determining the extent of these changes? Have they by customary law, from which the great force of international law has been derived through the ages, set the pattern for these entirely new concepts?

If overenthusiasm or failure to estimate properly the difficulties of the task have led individuals and nations to embark on a program of revolution by treaty law, is it too late to retrace the steps and start on a new policy? The development of the moral force of the United Nations for peace and order in the world is set forth dramatically in the introduction to the Fourth Annual Report of Secretary General Trygve Lie on the work of the United Nations.

If a failure to consider the effect of treaty law in the United States has led to a program for the creation of such law effecting serious changes in the constitutional basis of the United States, then in the cause of peace throughout the world, through a strong United States, the policy could be changed to the purpose of the United Nations—the use of moral force. All freedom-loving nations can join in such a fight. At the same time, through regional agreements such as the Atlantic Pact and the Treaty of Mutual Assistance, aggression will be proscribed.

III. DOMESTIC QUESTIONS AND INTERVENTION

In connection with the broadening program of the United Nations in the fields of social and political welfare, consideration must be given to the Charter of the United Nations which provides in article 2 (7) :

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."

We do not believe that the article was inserted in the Charter to be of no force and effect. The President of the United States and the Secretary of State advised the Senate and the people of the United States that it was to have effect. We are fortified in that opinion by article 3 of the Draft Declaration of the Rights and Duties of States, which has just been adopted by the International Law Commission:

"Every state has the duty to refrain from intervention in the internal or external affairs of any other state."

Recently Judge Florence Allen, at a meeting in Detroit of the Inter-American Bar Association, delivered a striking address in which she discussed the policy of the United Nations of intervention in the internal affairs of nations contrary to the provisions of article 2 (7) of the Charter. She says:

"The maintenance of human rights and freedoms without distinction of race, sex, language, or religions necessarily will often involve domestic questions, arising wholly within one nation's territory, out of matters within her domestic jurisdiction."

She points out in a forceful manner that the policy of the United Nations constitutes a renewal of the intervention theory in international practice which has been discarded and for which has been substituted the good neighbor theory. She asks:

"Can domestic law be written for every nation by treaty?"

Her address will be available for study shortly.

The attempted limitation of article 2 (7) is accomplished by the doctrine, the latest pronouncement of which is set forth in the article of Moses Moskowitz in the American Bar Association Journal, April 1949, page 285:

"Perhaps the correct position would be that once a matter has become, in one way or another, the subject of regulation by the United Nations, be it by resolution of the General Assembly or by convention between member states at the instance of the United Nations, that subject ceases to be a matter being 'essentially within the domestic jurisdiction of the member states.'"

We were always under the impression that it took both parties to change a contract. If by treaty pure domestic questions become international matters, then only the highest degree of care must be exercised in the ratification of treaties.

In the support of the United Nations your committee asserts that its duty is to protect all provisions of the Charter until it is properly amended by the nations which created it, and that it has a correlative duty to protect the Constitution of the United States until it is amended.

The issues are:

1. Shall we be governed in internal affairs by treaty law or by laws passed by Congress with a constitutional basis?
2. Shall our foreign policy be intervention or good neighbor, as Judge Allen has pointed out? It cannot be both.

IV. INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW

We have referred to the new premise that international law is no longer only the law of states but that of individuals. That doctrine has been asserted with great confidence in spite of its growth of 10 years. Very few attempts have been made at an appraisal of the obligations and the possible rights created under it. An eminent international lawyer, Dr. Philip C. Jessup, in his book, *A Modern Law of Nations*, has given his views, which we quote without comment, p. 137:

"With the acknowledgment of the individual as a person of international law, it will no longer be necessary to speak solely in terms of the rights of states when dealing with privileges and rights conferred by commercial treaties and other treaties dealing with economic and social rights. States may still conclude treaties on behalf of their nationals; they may be, so to speak, convenient instruments for collective bargaining. The state may retain its own right to proceed against another state in case of a treaty breach, but the individual citizen may likewise have his own procedures for vindication of his own rights. Thus the infringement of a trademark or patent under the protection of an international convention may be the basis for a cause of action in an appropriate forum by the individual possessor of the right, which he would derive immediately from the convention and not mediately through some national law passed for the implementation of the treaty. Procedurally speaking, it may prove advantageous to have suits instituted first in national courts, but there might be subsequent review by an international tribunal, as already discussed in claims cases. Likewise the individual, black or white, would have a cause of action in case he or she were the victim of a breach of an international slavery convention. More prosaically, the individual businessman, air line, or steamship company would not have to wait on the slow wheels of diplomacy to secure damages for a violation of rights under a bipartite treaty of commerce or a multipartite convention concerning commerce and navigation."

The Genocide Convention is based on that doctrine.

V. TREATY LAW AS DOMESTIC LAW OF THE LAND—AS SUPREME LAW UNDER THE CONSTITUTION

From the article *Human Rights and International Law*, *American Bar Association Journal*, July 1949, page 551, we use the following statements of the constitutional position of the United States under treaty law, and invite the most careful study of the subject:

"The full impact of the proposed treaties of genocide and human rights in the United States is revealed in the next question—What is the effect of treaty law as domestic law of the land, as supreme law under the Constitution?

"In your discussions at the meeting last year of the effect of customary international law as domestic law, Dr. Hyde referred several times to the question of treaties as domestic law under the Constitution of the United States, but the subject was not pursued. It took an English lawyer, Professor Lauterpacht, to make clear to us anew our constitutional position in these words, p. 179:

"The distinction between 'domestic law' and 'constitution' is deliberate. As to the first, it is clear that in the absence of a special enactment or declaration by the national legislature, the Bill of Rights, even when ratified, would not, in most countries, necessarily become part of the municipal law of States ratifying it. In the United States article VI (2) of the Constitution provides that all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

"To that article the courts of the United States have given a generous interpretation, amounting occasionally to an attribution to a treaty of an effect dangerously approaching that of a constitutional amendment. But in other countries a duly ratified treaty is not part of municipal law until it has been made so by an express act of the national legislature. In Great Britain treaties affecting private rights—and these include practically all treaties—do not become the law of the land unless they have been made so by a special act of Parliament."

"Since the above was written in 1944, to a limited degree the same effect is had in France. Involved herein is the difficult question of a treaty which is self-executing in whole or in part. The mere fact of the necessity of implementation by legislation, such as the definition of crimes under international law and fixing penalties, does not make a treaty non-self-executing. It seems to be plain

that the essential portions of the Genocide Treaty and the proposed Human Rights Treaty are self-executing, in spite of the note of the drafters of the latter to the contrary. Only clear intent in the treaty itself can prevent the automatic operation of the Constitution of the United States. Thus, there may be created, as law, a third body of treaty law in this country, with no constitutional basis whatsoever, of equal dignity with our Constitution, as supreme law of the land, superseding all State constitutions, decisions, and laws of the States covering the same subjects, and probably superior to all prior enacted laws of Congress on the subject. Of course, it is no answer that subsequently enacted laws by Congress may abrogate or terminate a treaty. This country is not in the habit of ratifying treaties with the intention of repudiation. The effect in this country of a ratified treaty of human rights and, in a limited degree, the Genocide Treaty, in a field which has been almost exclusive in the States, is so far-reaching in its consequence that the word "revolutionary" is not fully descriptive. Again, it is no answer to say that the treaty is non-self-executing. Under international law the duty to implement a treaty fully and completely is of the same high moral order as the obligation of the treaty itself. It is asserted that Congress has never failed to so implement a treaty.

"The case cited by Professor Lauterpacht is the famous migratory bird case, *Missouri v. Holland* (252 U. S. 410), in which Lovelathan, with deep concern for the food supply of wild duck for a suffering people, blithely asserted that there is no limit in the United States to the treaty-making power and legislation enacted thereon unless it is prohibited by the Constitution.

"The problem is aggravated by the recent series of cases in the Supreme Court which deal with the power of Congress to appropriate entire fields of legislation to the exclusion of the States. I leave to your imagination as to what would happen in the field of administration of municipal law if subversive elements should trench minorities that the field of civil rights and laws had been removed to the field of international law, with the consequences outlined by Dr. Jessup, as quoted herein.

"The paucity of discussion of these constitutional features is difficult to understand. Is it possible that discussion would not comport with propaganda?"

To this we would add the observation that even if a treaty adopted the entire Bill of Rights of the United States, consent to and ratification of the treaty would transfer all jurisdiction in civil rights to the Federal field to the exclusion of the States.

From the familiar pen of Harold R. McKinnon the Committee offers this:

The objective of securing human rights throughout the world is a laudable one. Moved by this objective, some are seeking to achieve it immediately by law. It must be remembered, however, that law presupposes a political foundation, which is government. And government presupposes a minimum moral sense, including the recognition of the Divine origin of basic human rights. Without government, law lacks institutional character and is merely conventional; and without sound moral principles, government is but an instrument of force. In place of world government today, we have a federation of independent sovereignties agreeing to agree in the future. And in many areas of the world, the moral foundations, which are expressed in our Declaration of Independence, are lacking. To attempt to secure human rights by a professedly legal framework such as an international court of human rights, without these political and moral prerequisites, is an illusory effort which would set the world backward rather than forward, because it would raise hopes which would never be realized and which would therefore be followed by despair and revolt.

VI. THE COVENANT ON HUMAN RIGHTS

1. Accommodation to Constitution

The last draft of the Covenant is appendix A to this report.

The outstanding problem at this time of the proposed Covenant on Human Rights is that of accommodation of the treaty to the Constitution of the United States.

A careful statement was made by the representative of the United States to this effect:

"Mrs. Roosevelt, as the Representative of the United States, pointed out during the discussion of paragraph 1 of article 2 that in the view of the United States, when the Covenant is signed and ratified the obligations of the Covenant should be carried out by the parties to it through legislative and other measures, existing or to be enacted, giving effect to the provisions of the Covenant, particularly

with regard to articles 5 to 22. She pointed out that under this procedure, these articles of the Covenant should not themselves become operative as domestic law."

In addition, article 24 of the proposed Covenant is offered:

"In the case of a Federal State, the following provisions shall apply:

"(a) With respect to any Articles of this Covenant which the Federal Government regards as appropriate under its constitutional system, in whole or in part, for Federal action, the obligations of the Federal Government shall to this extent be the same as those of parties which are not Federal States;

"(b) In respect of articles which the Federal Government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent States, provinces, or cantons, the Federal Government shall bring such provisions, with favorable recommendation, to the notice of the appropriate authorities of the States, provinces, or cantons at the earliest possible moment."

In our opinion, these proposals do not meet the problem. Can the mere statement in the treaty that its provisions shall not become domestic law prevent the automatic operation of a plain provision of the Constitution of the United States? Bearing in mind that the self-executing provisions of a treaty do become domestic law of the United States, and that the obligation to implement a treaty, as provided therein, is as strong an obligation as the treaty itself, the point is reached, when the necessary legislation has passed, that the treaty is fully self-executing and becomes domestic law of the land by constitutional process. As we shall show, the present draft omits significant provisions of our Bill of Rights. Unless the treaty provisions substantially follow the Bill of Rights of the United States, the treaty as implemented may be of equal dignity with our Bill of Rights (art. 2 (1)). Even if our Bill of Rights is followed or copied exactly, the entire field of civil or human rights is taken from the States and vested in Congress. All State constitutions and State laws are superseded by Federal legislation implementing the treaty. Shall that result be attained other than by amendment of the Constitution by the people of the United States and not by two-thirds of the Senators present at the ratification of a treaty or by an implementing vote of a majority of Congress? That is the problem to be solved in both the Covenant on Human Rights and the Genocide Convention if the treaties are to be ratified. No solution is as yet in sight and in the Genocide Convention no effort has been made to solve it in any way.

Article 24 is defective for three reasons. If by Federal jurisdiction is meant Federal Territory only, the effect of the treaty is so negligible as to be useless, except as to the District of Columbia, for instance. In view of recent events in the District, this may be highly significant. If article 24 means jurisdiction of the Federal Government in a political sense, action by Congress is appropriate and valid under a ratified valid treaty. The option in 24 (b) to refer any matters to the States is defective because the discretion to exercise the option rests in officials of the Government only and the States are helpless. If reference is made, it is useless because the States have no power whatsoever under our Constitution over foreign affairs. New York or California have no power to say that they will not accept certain portions of the human rights treaty. It is all or nothing, and if there is Federal power in that field it is nothing for the States. That is the issue to be faced.

Article 2 (1) provides:

"Each State party hereto undertakes to ensure to all individuals within its jurisdiction the rights defined in this Covenant. Where not already provided by legislative or other measures, each State undertakes, in accordance with its constitutional processes and in accordance with the provisions of this Covenant, to adopt within a reasonable time such legislative or other measures to give effect to the rights defined in this Covenant."

Article 22 (2) provides:

"Nothing in this Covenant may be construed as limiting or derogating from any of the rights and freedoms which may be guaranteed to all under the laws of any contracting State or any conventions to which it is a party."

These articles are new in the present draft of the Covenant and careful analysis has not been possible. They would appear to be in conflict. Under article 2 each State undertakes to adopt the rights as defined by the Covenant. By implementing legislation each State undertakes to provide by legislation the rights as defined in the Covenant. Where not already provided in the defined form, legislative changes shall be made to meet such defined form.

Paragraph 22 (2), proposed by Great Britain, preserves existing rights. In the event of conflict of rights, as defined by the Covenant, and existing rights, which

will govern? The provision in the Covenant for trials of accused without restriction as to place, and the Sixth Amendment, guaranteeing the right of trial in the state or district in which the crime was committed, is a case in point. If the provision for trial as defined by the Covenant governs, the door is open to trials of American citizens before international tribunals for crimes committed in this country. If the provision in the Sixth Amendment governs, then the Constitution of the United States remains the supreme law. That this problem is not remote, is indicated by article 14 of the Draft Declaration of the Rights and Duties of States, American Bar Association Journal, August 1940, page 689:

"Every state has the duty to conduct its relations with other states in accordance with international law and with the principles that the sovereignty of each state is subject to the supremacy of international law."

Article 2 (1) and article 22 (2), which indicates a desire to meet the constitutional problems of the United States, at best will be only a partial answer to that. The search must continue.

The Committee makes two proposals for study only as to this problem:

1. That there be included in the Covenant a provision that the Covenant shall not become domestic law by ratification.

2. That the United States Senate adopt these principles for the guidance of the representatives of the United States:

"That no part of the Covenant on Human Rights or the Genocide Convention shall become domestic law of the United States, or of states of the United States, which is prohibited by the Constitution of the United States, which shall change in any way the division of power of federal and state governments, shall enlarge the present constitutional jurisdiction of Congress or detract from the powers of the states of the United States."

These are the essential provisions which will determine the legality of a treaty in the United States as they have been stated in substance in decisions of the Supreme Court of the United States. To this we add the carefully drawn statement of Professor Corwin in *The Constitution and What It Means Today*, page 96:

"The power to make treaties is bestowed upon the United States in general terms and extends to all proper subjects of negotiation between nations. It should be noted, however, that a treaty to which the United States is party is not only an international compact but also 'law of the land', in which latter respect it may not override the higher law of the Constitution. Therefore, it may not change the character of the government which is established by the Constitution nor require an organ of that government to relinquish its constitutional powers. The powers of the States, on the other hand, in contradiction to the right of their peoples to maintain efficient governments for the exercise of those powers, set no limit to the treaty-making power."

We realize the sweeping nature of these proposals; they are designed to meet the admittedly revolutionary proposals of the Covenant on Human Rights and the Genocide Convention.

Earnest and thorough exploration of these problems has been had with representatives of the State Department and students of international law. They have been discussed in our conferences. Canada and other states will have similar constitutional problems.

2. Specific provisions

We recommend to lawyers everywhere most careful study of the various drafts of the International Covenant on Human Rights. In the limits of this report we are able to discuss only a few provisions.

(a) The provisions of the fifth and sixth amendments of the United States Constitution are clear and positive as to protections thrown around the accused in criminal prosecutions, in particular in all prosecutions the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

Article 9 of the proposed covenant contains nothing as to the place of trial of the accused. The trial before an international tribunal would satisfy the provisions of that article. In the migratory bird case, *Missouri v. Holland*, it is said that there are no constitutional limits to the treaty-making power unless there is a prohibition in the Constitution of the United States. We pose the question, which we believe to require a negative answer, as to whether or not a treaty which does not recognize the right of trial by a citizen of the United States in the State or district in which the crime was committed is

constitutional. This question goes to the heart of any proposal for the establishment of an international court. We pose the question also as to whether or not a treaty granting less than our Bill of Rights, thus denying rights recognized by our Constitution, would be constitutional.

(b) Article 2 (1) (a), of the proposed Covenant on Human Rights is this:

"(a) Everyone has the right to liberty of movement and is free to choose his residence within the borders of each State."

We are not arguing the merits of the proposal at this time. That this will conflict with many State laws on the subject and voluntary agreements which have been upheld by the Supreme Court of the United States would seem to be clear. We direct your attention to the extent of the changes involved in our social structure and the amount of internal struggle involved therein. Shall such sweeping changes be the product of amendment of our constitutions, Federal or State, or of treaty law? The Committee on Civil Rights appointed by the President of the United States, has said:

"The Human Rights Commission of the United Nations at present is working on a detailed national bill of rights designed to give more specific meaning to the general principles announced in article 55 of the Charter: If this document is accepted by the United States as a member state, an even stronger base for congressional action under the treaty power may be established." Report of Civil Rights Committee, paragraph 10.

The practical application of all of this is shown by an excerpt from the letter of Whitley-Eaton Service, August 6, 1949, from which we quote:

"The House committee report on the proposed Fair Employment Practice Act declares that it is 'immaterial whether or not the measure could be constitutionally enacted in the absence of an enabling treaty.' It maintains that article 56 of the United Nations Charter (a treaty) absolutely necessitates Federal legislation to achieve the purposes of article 55, purportedly the same as in FEPCO.

"Under this construction, a whole series of laws, heretofore considered clearly unconstitutional, could be legally enacted if apparently authorized by a treaty, which is the supreme law of the land. The point heretofore has not been of material importance, but can assume tremendous significance in view of the many international engagements to which the country is already committed or may hereafter commit itself."

The only remedy now for this situation is rejection of treaties dealing with domestic questions, which do not recognize and provide for the constitutional situation of the United States. The problem is not only legalistic but intensely practical, a matter of pending legislation in Congress.

5.

Another very difficult matter, in which the Commission on Human Rights is about evenly divided, involves the enforcement machinery in the implementation of the covenant. The United States is opposed to the right of individual or group petitions against violations and it has consistently supported that position. It has proposed that only states shall have the right to file petitions to a screening and investigating committee without powers to act. India, France, Australia and other states insist that states, groups, or individuals shall have the right to take action in the United Nations or before an international tribunal. That includes the right of a citizen of a state to file a petition against his own state. We have cited the views of Dr. Jessup on the question of individual liability. Officials in this country of a prominent world organization insist at all times on the full rights of the individuals, in spite of the official position of this country. We believe that our officials will welcome aid, advice, and support of American citizens on this vexing problem. It is discussed fully in State Department Bulletin, volume 21, July 11, 1949. The Committee believe that the position of the United States must be maintained.

We have used these three questions, not in an exclusive way, but because we believe that they are illustrative and typical of the questions involved. As no treaty has been signed, we do not deem it necessary to go further in analysis of the proposed draft. We feel that any action on the Covenant would be premature until a completed draft has been presented.

Let us say here that in our opinion lawyers can no longer be indifferent to these searching and pregnant problems. In our conferences we were told over and over again that the participants had no idea of the problems involved in these treaties. That they involve fundamental principles of government is apparent.

VII. THE GENOCIDE CONVENTION

I. Analysis

We have approached the question of whether or not the Convention on the Prevention and Punishment of the Crime of Genocide should be ratified by the United States, with full appreciation that acts which have been perpetrated against human groups, attempted to be defined as crimes against international law in articles II and III of the convention, shock the conscience of mankind, are contrary to moral law, and are abhorrent to all who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnic, racial, or religious group to which they belong.

The Committee is fully conscious of its obligation to be constructive. That has been its work. It realizes fully its influence and power as the representative of this great organization. It realizes its duty to carry out the express purpose of belief in and support of the work of the United Nations. It realizes also that only a strong United States can be really helpful in the world and that a strong United States depends on that which has made its strength possible, its form of government anchored on the Constitution of the United States and the Bill of Rights of its people. This, we are sure, is the spirit in which you would have us approach the problems which we now present.

Destruction of human groups, recently denominated genocide, has heretofore been deemed a matter of domestic concern only, and has not been considered, nor declared, to be "a crime under international law" until the resolution of the General Assembly of the United Nations dated December 11, 1948, which resolution, of course, does not per se constitute international law. (See powers of General Assembly, United Nations Charter, Chapter IV, articles 10 and 11.) "It is this resolution to which the Legal Committee gave full content by providing the General Assembly with a legal instrument designed not only to prevent genocidal acts but also to punish the guilty. (Letter of transmittal of Genocide Convention by the State Department to the President of the United States, appendix D to this report).

By the Genocide Convention or treaty the contracting parties affirm in article I "that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

Articles II and III of the convention read:

"Article II

"In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

"Article III

"The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide."

Article V obligates the contracting parties to enact the necessary legislation to give effect to the provisions of the convention and to provide effective penalties "for persons guilty of genocide or of any of the other acts enumerated in Article III."

Article VI provides that "persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory in which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

Article VIII provides that "any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United

Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

Article IX provides that "disputes between the Contracting Parties relating to the interpretation, application, or fulfillment of the present Convention, . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Thus it will be seen that it is proposed by the action of the President, consented to by two-thirds of the Senators present when Senate action is taken, to define certain acts, which have traditionally been regarded as domestic crimes, as international crimes and to obligate the United States to provide for their prevention, suppression, and punishment and for the trial of persons accused thereof either in our domestic courts or in an international tribunal.

To diagnose is often a painful, difficult task. It becomes important, however, to discuss what the Genocide Convention is and what it is not.

The drafters of the convention started with high hopes, which evidently were disappointed as difficulties forced inevitable concessions and compromises.

All states, responsible public officials, individuals--were to be covered in the international crime of genocide. In the end it is admitted that states cannot be guilty of crimes; that civil liability, sanctions, and force can only be used against states; that certain constitutionally responsible officials, such as rulers who have constitutional immunity from punishment for crimes, as the King of Sweden, the Premier of Russia, and the Politburo, and other rulers, cannot be punished for genocide; and that governments will not surrender their high officers for trial for genocide.

What is said to be left is a code of domestic crimes which the representative of the United States said are already denominated in all countries as common-law crimes. These are made international crimes.

All national, ethnic, racial, religious, and political groups were to be protected against destruction by killing or other methods of destruction. Political groups have been punished and the other groups must be destroyed "as such." The use of "as such" undoubtedly made it safe for the signing of the convention by the U. S. S. R.

Practically all nations agreed on the necessity of an international penal tribunal if the effort against genocide is to be effective. This means trial in either domestic or international courts, or both. It is left entirely to the future.

The position expressed by the United States representative was that genocide is a matter between states, that it cannot be committed without the complicity of the state. The unassailable position of his country as stated by him was not accepted. Inletment to genocide was made an international crime in spite of repeated objections of the United States representative that it infringed on freedom of speech and freedom of the press.

The above instances and many others which could be cited have been taken directly from the official report of the United Nations Summary Records of the third session of the Ad Hoc Committee and the meetings of the Sixth Committee, September to December 1948. Documentation is readily available for any student of the subject.

The Senate of the United States is now urged to give its consent to the Genocide Convention. The diagnosis is not overdrawn. We quote from the preface of an analysis of the Genocide Convention by Dr. Nehemiah Robinson for the Institute of Jewish Affairs, World Jewish Congress, dated July 1949, and just received:

"There are divergent views on the import of the convention. The Australian Prime Minister, Evatt, described its approval by the General Assembly as an 'epoch-making event.' On the other hand, the British Attorney General, Sir Hartley Shawcross, said that the Assembly should beware of deluding people into thinking that a great step forward had been taken through the adoption of the convention, whereas, in reality, nothing has been changed. The latter point of view was supported by Prof. J. L. Brierly ('The Genocide Convention,' the Listener, London, March 10, 1949); according to him, 'the real danger is if we allow it to go out in the world, as has been done with this convention, that an important advance has been made when in fact nothing important has happened at all.'"

"The present commentary strives to provide, in a totally detached way, a clue to the value of the convention, for only on the basis of a detailed study can its importance be properly estimated.

"Professor Brierly's approach is what he calls 'instinctively cautious and empirical.' It is the right and duty of a lawyer to be cautious and empirical, but it serves no good purpose to proclaim in advance, on the basis of such an ap-

prong, the uselessness of the Genocide Convention. It would be much more proper to put it into practice and judge its usefulness on the basis of experience. But for this the convention must first be set in motion, i. e., the necessary number of States must ratify it."

We do not believe that these paragraphs need any comment from the committee to an American lawyer. Government by treaty and by doubtful experiment is the new order of the day.

2. Failure to recognize the constitutional position of the United States

This subject has been discussed generally in the report under the heading of the "Accommodation to the Constitution." For convenience and as emphasis of the importance of the questions we restate the constitutional position of the United States as expressed by Judge Orin L. Phillips in a recent address:

1. The external powers of the United States are to be exercised without regard to State laws or policies.

2. The treaty-making power is not limited by any express provision in the Constitution. It does not authorize what the Constitution forbids and its exercise must not be inconsistent with the nature of our Government and the relation between the States and the United States.

3. The treaty-making power is not subject to the limitations imposed by the Constitution on the power of Congress to enact legislation, and treaties may be made which affect rights under the control of the States.

4. A treaty, entered into in accordance with constitutional requirements, has the force and effect of a legislative enactment and to all intents and purposes is the equivalent of an act of Congress. In addition to being an international contract, if self-executing it becomes municipal law of the United States and of each the States, and the judges of every State are bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. If the treaty provides for implementation by legislation, the duty to enact such legislation is as strong as the treaty itself, and upon implementation the treaty and the legislation become the domestic law.

5. In the event of a conflict between a treaty made in accordance with constitutional requirements and the provisions of a State constitution or a State statute, whether enacted prior or subsequent to the making of the treaty, the treaty will control.

We have referred to the effort in the drafting of the covenant on human rights to recognize the problems which arise in the constitutional system of the United States if a treaty deals with what have always been regarded as domestic questions which have fallen in either the Federal or State systems of laws. No such effort has been made in the Genocide Convention. A code of domestic crimes has been drafted with the obligation on contracting States to adopt such crimes as domestic law as drawn and written to be enforced in domestic courts until an international court shall have been created.

The definitions of crimes of genocide are clearly self-executing and become the law of the land. Endless confusion in the dual system of the United States is evident. The letter of transmittal of the Department of State shows that the same crime may be murder in State law, genocide in the Federal and international fields. Race riots are local crimes and genocide. Lynching may be either, dependent on the intent and extent of participation. To impose a great new body of treaty law which will become the domestic law of the United States is a tremendous change in the structure of the relation of States and the Federal Government under our Constitution, of doubtful constitutionality, as shown by Professor Corwin. To deprive the States of a great field of criminal jurisprudence and place it in the Federal field alone, or under the jurisdiction of an international court, is truly revolutionary, not to be effected without amendment of our Constitution.

The failure of the drafters of the Genocide Convention to recognize the need to meet the constitutional situation of the United States in any way, in our opinion, is a fundamental error and a barrier to ratification of the Convention by the Senate of the United States on this ground alone.

3. Place of trial for citizens of the United States

As particularly applicable to genocide, we repeat that under article III (3) of the Federal Constitution all crimes are triable by jury, and "such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." And in the sixth amendment it is provided

that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

When it is borne in mind that the rights as embodied in the first 10 amendments are a restraint on our Federal Government—rights which every citizen inherently has against the United States and which it does not possess and cannot give away—how can that Government by treaty, or otherwise, delegate the punishment of a crime, which can become such only by act of Congress, to an international tribunal?

In the case of any crime which Congress has defined and for which it has prescribed the punishment, an American citizen is entitled, in an American court to all the safeguards set forth in the Constitution.

The State Department says in its letter of transmittal to the President, "Thus the commission in American territory of genocidal acts would be triable only in the American courts. No international tribunal is authorized to try anyone for the crime of genocide. Should such a tribunal be established, Senate advice and consent to the United States ratification of any agreement establishing it would be necessary before such an agreement would be binding on the United States."

The following statement was made by another representative of the United States at the Seventy-fourth meeting of the Sixth Committee of the General Assembly of the United Nations, at Paris, October 14, 1948: "The United States delegation intended, at a later stage, to show the need for the establishment of an appropriate international tribunal." Records of the third session of the General Assembly, part I, page 103.

The debates of the ad hoc committee and the Sixth Committee show that such a tribunal is regarded as an absolute necessity if genocide is to be punished.

The committee is opposed to subjecting our citizens and other persons within our territorial jurisdiction, to trial, conviction and sentence, for acts of genocide committed in the United States, by an international penal tribunal where they would not be surrounded by the constitutional safeguards and legal rights accorded persons charged with a domestic crime.

There should be no implied approval or commitment for the creation of an international court for trials of American citizens for genocide.

4. Denial of free speech and freedom of the press

Article III (c) of the Genocide Convention provides that "direct and public incitement to commit genocide" shall be a crime. This was adopted in spite of repeated objections of the United States representative that it was a plain infringement of freedom of speech and freedom of the press. Who shall judge if political speeches are incitement to genocide, the civil authorities? The Supreme Court seems to have settled that in the Terminiello case. Who shall judge as to freedom of the press? As prevention of genocide, shall censors be provided by the state? Representatives of many countries insisted that as between genocide and freedom of speech and freedom of the press, the latter must give way. The position of our representative seemed to be incomprehensible to many of them. The representative of the United States boldly said that genocide should stop where freedom of speech begins. He warned the other nations more than once that inclusion of incitement of genocide would present an obstacle to the ratification of the convention by his country.

If the effort to promote human rights in the world is to mean anything, it would seem to be essential that freedom of speech and freedom of the press be preserved and that no treaty, no matter what its purpose, which seeks to deny those rights should be considered by the Senate of the United States.

The cause of human rights will not be advanced in the world by denying those rights in another world treaty.

5. "As such"

The convention defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The words "as such" were inserted against the advice of the United States and other states. Political groups have been omitted and the named groups must be destroyed as such. It is agreed that "destroy" does not mean "kill." They may be destroyed for any other reason, such as the use of persecution, terror, deportation, or slave labor for those who undermine the

state or are enemies of the state. People are persecuted, tried, and condemned for their religious beliefs under the guise of protecting the state and its ideology against enemies of the state. That is not genocide. The door has been opened, in the opinion of men highly versed in international law, to complete emasculation of the purposes of the convention. Indeed one of them asserted that the words "as such" would probably exclude from the concept of genocide most of the famous massacres and persecutions of history. *Congressional Record*, July 6, 1947, page A-4510. The United States cannot be a party to such hypocrisy.

6. Duty to prevent genocide

Articles II and VIII of the convention leave in doubt as to whether or not the contracting parties "undertake to prevent and to punish" genocide only within their respective jurisdictions or if the firm undertaking is to prevent and punish it throughout the world. This ambiguity should have been resolved in the draft. The committee is aware of the fact that under conventional international law, as it has been understood in the past, the undertaking to prevent would extend only to the jurisdiction of a particular state. But conventional international law is claimed to be a thing of the past and new concepts are asserted with authority. In international law it is the word "undertake" that imposes the most solemn obligation. It is used only once in the Atlantic Pact.

In the note by the secretariat of the United Nations to the Ad Hoc Committee on Genocide (Economic and Social Council Report, April 2, 1948), setting forth the view of the secretariat as to the provisions to be inserted in the proposed Convention on Genocide, this is found:

"III. The convention will be concerned not only with the punishment of genocide but also with its prevention.

"Prevention may take other forms than penal measures. There may be international prevention of a political nature. That would be the case if it was provided that the States parties to the convention should inform the organs of the United Nations in order that they might prevent the commission of genocide."

What the secretariat of the United Nations meant by the foregoing is shown by article XII of the proposed draft convention prepared by the secretariat.

"Article XII

"Irrespective of any provisions in the foregoing articles, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes.

"In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations."

The Draft Convention prepared by the Ad Hoc Committee of article VIII was this:

"1. A party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide."

There is no mention of punishment.

Article VIII in the present convention provides that "any contracting party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts in article III. Again there is no mention of punishment.

Mr. Marcus, acting director of the political department to the World Jewish Congress, appeared before and submitted a general statement on genocide to the Ad Hoc Committee, and submitted the following as a partial summary of the views of the congress:

"(a) Preventive measures should not be confined solely to parties to the convention, but should be of universal application;

"(b) The convention should include the obligation, for all member states, to take measures to prevent the occurrence of genocide before the actual destruction of human groups began;

"(c) The convention should make provision for effective measures compelling States to deliver to the international authority all persons guilty of acts of genocide, regardless of the personal status of such persons;

"(d) The convention should make provision for the reparation of material damage caused by acts of genocide, and for the establishment of an international authority to adjudicate claim in such connection."

The letter of transmittal of the Department of State contains this:

"Thus the heart of the convention is its recognition of the principle that the prevention and punishment of genocide requires international cooperation. However, the convention does not substitute international responsibility for state responsibility. It leaves to states themselves the basic obligation to protect entire human groups in their right to live. On the other hand, it is designed to insure international liability where state responsibility has not been properly discharged."

The question is as to whether or not the affected groups, or their states, shall have the right to demand prevention and suppression of genocide because of the international responsibility of the contracting states. Is this an insurance policy for minorities? In the Treaty of Mutual Assistance and the Atlantic Pact the obligation in the event of aggression is to consult with other parties to the pacts and there is no blanket obligation to prevent aggression. Only in that way was the obligation to go to war without a declaration of war by Congress overcome.

We have shown the careful consideration given to this article VIII before its inclusion in the covenant.

From page 33 of the analysis of the Genocide Convention by the World Jewish Congress we quote:

(Article VIII)

"(a) This article may appear to play an important part in the prevention of genocide because it is, in its wording, the only article dealing with actual prevention and suppression of this crime. However, this interpretation is not in accordance with either the Charter of the UN, or the text of the article and the avowed intention of its drafters. It is indicative of the little value which the members of the Sixth Committee attached to this article that it was originally deleted by it on the ground that this article did not comprise anything which was not already contained in the UN Charter because, under the provisions of the Charter, the members were entitled to appeal to organs of the UN in case of need."

Evidently we are to be led to believe that in a convention, which took several years to prepare by lawyers, there was inserted an article, providing for the exercise of wide powers in the prevention and suppression of the acts of genocide, which does not mean anything at all. The convention contains nine enacting articles of which one is meaningless and innocuous. In our opinion, if any further evidence is needed in support of the statements made in this report as to the duty of prevention and suppression of genocide under the treaty, it has now been supplied. A real purpose of the convention is to prevent and suppress genocide in the world and that duty may rest on the ratifying states by action within or without the United Nations.

We assert that if an obligation of the convention is to prevent and suppress genocide wherever it appears in the world, in civil and religious wars, in racial and ideological struggles, and in domestic life of the nations, it should be clearly stated. The United States may have to assume such an unknown obligation but, if so, let the country know it. The situation cannot be denied or glossed over any longer.

7. Definition of crimes by Congress

Articles II and III undertake to define certain acts as international crimes to be made effective in the United States by action of the President, concurred in by the affirmative vote of two-thirds of the Senators present, without concurrent action by the House of Representatives, the body traditionally regarded as closest to the people.

Such acts are declared by the convention to be crimes under international law. If such acts are offenses against the law of nations, article I of the Constitution of the United States provides:

"The Congress shall have power

"10. To define and punish . . . offenses against the law of nations."

If such acts are to be made offenses against the law of nations, for which our own citizens are to be punishable, they should be declared so by action of the Congress under the above provision of the Constitution.

To undertake to so define them by treaty would be of doubtful constitutional validity and to set out on a course of undertaking to define by treaty what acts

committed within our territorial jurisdiction shall constitute international offenses, and be punished as such, would be an unwise departure.

It is one of our fundamental legal concepts that a legislative body, in the exercise of its power to declare what constitutes a crime, must define it so as to inform persons subject thereto, with reasonable precision, what it intends to prohibit so they may have a certain and understandable rule of conduct and know what it is their duty to avoid.

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to the application, violates the first essential of due process."

The definitions in articles II and III of the convention do not meet that test. For example, what is a part of a national, ethnical, racial, or religious group—one member, two members, how many? The original drafts did not contain the words "in whole or in part." They were inserted at Paris. The difference between destruction of a group or part of a group is pronounced. It brings in many acts which would not be included in the destruction of the whole of a group.

It is conceded that the word "destroy" does not mean "kill." Destruction may be accomplished by other means.

What is destruction of part of a group by "mental harm"? Do many present laws cause such destruction?

If an act was done with intent to destroy a substantial number of members of a group, although actuated by no malice toward the group, as such, would that be genocide?

The defect of precision in definition becomes all the more important when regard is given to the fact that the final power of interpretation of the provisions of the convention may be vested, not in our courts, but in the International Court of Justice by article IX of the convention.

Appendix B, dealing with definitions of crimes of genocide, is taken from the Genocide Convention—Its Origins and Interpretation, by Dr. Nehemiah Robinson.

8. Compulsory reference to World Court

Article IX of the convention provides that disputes between the contracting parties relating to the interpretation, application, or fulfillment of the convention, shall be submitted to the International Court of Justice at the request of any party to the dispute.

Under the Genocide Convention many of the disputes to be submitted to the International Court of Justice will involve matters which by treaty, and not by customary law, have been changed from domestic questions and local law to the field of international law. A State or Federal court may decide that a crime does not constitute genocide, that intent has not been shown, that the crime falls within the local jurisdiction. Is the United States now ready and willing to establish the International Court of Justice as a court of review over its Supreme Court and all lower courts without any limit to such jurisdiction? The position of the United States as expressed by the representative of the United States to the Sixth Committee was that an international court should have jurisdiction only if a state failed to act in accordance with the treaty or if justice had not been done in a state. The proposal of the United States was not accepted.

In such a case the International Court of Justice would be empowered to assess damages by way of reparations against the Government of the United States.

In case our courts continued to refuse to accept the interpretation of the International Court of Justice, the United States might be liable for continuing damages.

Article IX should be eliminated from the treaty because the United States is now obligated by article 36 of the Statute of the International Court of Justice to submit to the jurisdiction of that court all legal disputes concerning:

- (a) The interpretation of a treaty;
- (b) Any question of international law;
- (c) The existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.

The foregoing enumeration embraces all disputes that could be submitted to the International Court of Justice under article IX of the Genocide Treaty. The ratification of that article would have the effect of avoiding the Connally and Vandenberg reservations in the declaration of the United States Government accepting the compulsory jurisdiction of the International Court of Justice under article 36 of the statute.

The Compulsory reservation it will be recalled, provides that disputes with regard to matters which are essentially within the domestic jurisdiction of the United States shall be submitted to the Court "as determined by the United States of America." Paragraph 6 of article 36 of the statute provides that "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

The Vandenberg reservation stipulates that American acceptance of compulsory jurisdiction of the Court shall not apply to "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction."

It is possible that all parties which ratify or adhere to the convention on genocide might not be parties to declarations accepting the compulsory jurisdiction under article 36 of the Statute of the International Court of Justice; but it would not seem to be incumbent upon the United States to agree to special articles conferring such jurisdiction with nations which have the option of accepting the procedure now prescribed in the statute for that purpose.

The committee does not deem it appropriate at this time to raise the question whether or not these reservations should be continued or repealed. The committee thinks it its duty, however, to inform the house of delegates as to the foregoing effect of article IX of the Convention on Genocide should that convention be ratified by the United States.

Judge Allen, in her Detroit address, urges strongly that there be a determination now of the effect of article 2 (7) of the Charter and the cladped position of United Nations as to its right to make international law. Until there has been a clarification of the power of United Nations to determine international law and the effect of article 2 (7) of the Charter, the committee does not believe that it is advisable that any change be made by the Senate of the United States in regard to compulsory jurisdiction of the International Court of Justice.

The statement of George A. Finch, vice president of the American Society of International Law, and a member of the committee, before the annual meeting of the society in Washington, D. C., on April 29, 1949, is of value on this question:

I shall not attempt to segregate the problems as between the Genocide Convention and the Covenant on Human Rights, because, in my view, both would have in many respects the same effect. . . . We already have in this country a highly developed system for the protection of human rights, sanctified by constitutional provisions and applied and interpreted by our courts—provisions that are based upon the principle that the individual is himself sovereign and possesses inherent human rights without having to ask for them from anyone. In our attempts to reach an international level, we are meeting with different concepts where, for example, rights are granted by governments or where governments are undertaking to guarantee certain so-called rights. We are bound to have a head-on collision between these different concepts and approaches in an attempt to reach an international agreement.

The concern of our lawyers is with the situation in this country if and when the proposed international agreements, reached as the result of necessary compromise, become the law of the land by enactment in treaty form. No person in this room can deny that now, except where resident aliens are involved, the subject of human rights is a matter completely within the domestic jurisdiction of the United States Government and the States of the Union. Nor can anyone deny that the minute we make a treaty on the subject we transform the subject matter into one of international concern. Thereafter we would not only have the right to tell other contracting parties what we think of their actions in the matters covered by the treaty, and invoke any prescribed sanctions, but the other contracting parties would have a corresponding right to make similar protests and demands upon us.

Some of the crimes that are described in the Genocide Convention and in the Draft Convention on Human Rights may be ordinary common-law crimes as well as international crimes under those documents. . . . Is the United States Government to place itself in the position where it will be obliged to enter into diplomatic explanations to foreign nations or some international agency in regard to the interpretation and application of the Constitution of the United States whenever an American citizen or his alien friends or fellow travelers may feel in a position to complain that his treatment in the courts of his own country is a denial of human rights?

If these proposals to protect human rights and to prevent genocide had been framed so as not to bring up internal constitutional questions, no one would have heard from the American Bar Association on this subject; but the proposals have

not been framed that way. They have been framed, and I think purposely framed, so as to take American domestic questions out of the sole jurisdiction of American courts and place them under some form of international appellate jurisdiction.

A convention or covenant which can be interpreted to apply to individuals committing ordinary common-law crimes and which may be invoked to raise discussion to an international level every time such a crime is committed by an individual, would cause more friction between peoples and governments than the evil itself now does and would tend to promote war rather than to preserve peace between nations. (Proceedings of the American Society of International Law, Washington, April 29, 1949.)

VIII. RECOMMENDATIONS

The recommendations of the committee are—

1. That the Genocide Convention, as submitted, shall not be ratified by the United States.
2. That copies of this report to the house of delegates be sent to the Secretary of State of the United States, to the Committees on Foreign Affairs of the Senate and House of the United States, and United Nations, for consideration by them.
3. That the Special Committee on Peace and Law through United Nations be continued.

IX. A STUDY FOR ALTERNATIVE ACTION

The committee presents for study and consideration the suggestion of Judge Phillips, one of its members, that acting within its constitutional powers in determining offenses against the law of nations, Congress shall make a firm declaration of its intention to prevent genocide as it is understood in its broad sense in the Federal Jurisdiction of the United States, and to provide punishment therefor. We quote Judge Phillips, American Bar Association Journal, August 1949, page 625:

"If genocide and kindred offenses defined in the treaty are in fact international crimes, would not the wise course be to enact domestic legislation under section 8, clause 10, article I of the Constitution of the United States, defining such offenses, and providing for the trial and punishment of persons committing such offenses, in our own domestic courts, where the accused will be guaranteed his constitutional rights and accorded due process under our concept of that phrase? We would thus set our own house in order, would offer the same protection to the accused as one charged with any domestic crime, and would reserve to our own courts the final determination of questions as to the interpretation of the penal statute."

Under this plan it is evident that due regard can be had to the constitutional basis of action of this kind by the United States and the respective powers of the governments in the states can be maintained. Useless controversy in this country will be eliminated at a time when it should not be permitted to occur. It would not be difficult to promote similar action in each State of the United States and to propose legislation to accomplish the objects. Thus the highest standard may be set in the world to be followed by action in other countries. When and if, in the process of time, a world order shall emerge with power and force to execute its law, international action, if necessary, will follow as a matter of course. Cooperation of the nations adopting this course of action and the United Nations may be effected and thus the obligation in the Charter of the United Nations to promote and further human rights may be discharged as the Charter intended.

X. REQUEST FROM SECTION OF INTERNATIONAL AND COMPARATIVE LAW

Upon the request of the section of international and comparative law and the recommendations of the board of governors, the committee agreed to submit the following question formulated by the section for discussion and the ascertainment of opinion in the 1949 regional group conferences:

"Should the American Bar Association recommend to the United Nations that it codify the law relating to crimes against the law of nations and that it take action toward approving permanent machinery for the trial of persons accused of such crimes together with the necessary enforcement procedure?"

In the limited time available at the conferences the questions were submitted for discussion.

As to codification, there was general agreement with the work of the committee of previous years to that end and for the work under way by the International Law Commission.

As to the second question, the opinion varies with the great preponderance against the proposal of the creation of international courts for the trial of citizens of the United States. In addition to the question of the constitutionality of such action as discussed in the report, the general sentiment is expressed in the following statement prepared by the Honorable Frederic M. Miller, former Justice of the Supreme Court of Iowa, a member of the committee:

It is a fundamental principle of criminal law that the laws of a state or country in which an offense is committed govern exclusively as to the nature of the offense and the punishment to be given upon conviction thereof; the courts of that state or country have exclusive jurisdiction for the trial of such an offense and the venue is determined by the place where the offense was committed. The authorities, legislative, executive, or judicial, of any state or country other than the one in which the offense was committed can take no action in regard thereto except by way of extradition to surrender the offender to the state whose laws have been violated. Under these rules of law, where one is charged with having committed a public offense in the United States, the courts of the State in which the offense is alleged to have been committed have exclusive jurisdiction of the trial, the laws of that State exclusively apply as to the nature of the offense and the punishment involved and the venue is fixed by the place where the offense is claimed to have occurred. If the offense is in violation of a Federal statute, the Federal statutes alone apply, our Federal courts have exclusive jurisdiction and the venue is fixed in the district where the offense is claimed to have been committed.

Under the foregoing principles of law, anyone accused of a criminal offense in this country can be tried only by the courts that meet the foregoing requirements and if the accused has the full benefit of the constitutional guaranties and the procedure prescribed for the trial of such cases.

The new concept would make many offenses now defined solely by the laws of the several states a matter not of Federal law, but of international law, and contemplates eventually the creation of international courts to try the offenders thereunder. When this concept is realized, the courts of this country, State and Federal, will be ousted of jurisdiction. Jurisdiction will be transferred to an international court. The procedure of the international court will not afford the defendant many of the protections which are now afforded him in our State and Federal courts. The venue will not be limited to the exact locality where the offense is alleged to have taken place in plain violation of the sixth amendment of the Constitution. The expense of transporting witnesses or taking their depositions may in and of itself jeopardize the defense of one accused of committing the offense under international law. America has reason to be proud of its courts and the safeguards which have been established to insure a prompt, fair, and impartial trial of those accused of crime. The safeguards thus established are taken for granted and the fact that they may be lost is realized by very few lawyers. Why should our courts be deprived of jurisdiction to try criminal cases arising in this country; why should those charged with offenses, which are now admittedly matters essentially within the jurisdiction of the several States, be deprived of the safeguards now established for their protection; why should those charged with offenses in this country be subjected to trial by an international tribunal under rules of procedure which deny many safeguards which our courts afford, possibly in a place far removed from the situs of the alleged offense? If this radical departure is to take place, surely there must be some valid reason therefor. The committee is convinced that no sufficient reasons have yet been presented to warrant such radical and revolutionary changes in criminal law and procedure in this country.

Respectfully submitted,

DEANE C. DAVIS,
GEORGE A. FINCH,
HAROLD R. MCKINNON,
FREDERIC M. MILLER,
NATHAN L. MILLER,
ORIE L. PHILLIPS,
ARTHUR G. POWELL,
ALFRED J. SCHWETTE,
FRANK E. HOLMAN,
President, *Ex Officio*,
CARL H. RIX,

Chairman, Special Committee on Peace and Law through United Nations.

(Genocide Convention, hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 81-2, January 23, 24, and February 9, 1950, pp. 157-175.)

THE GENOCIDE CONVENTION IS BEING MISREPRESENTED
By George A. Finch*

THE COMMITTEE ON PEACE AND LAW THROUGH THE UNITED NATIONS

In view of the unjustified attacks upon the American Bar Association because of the considered criticism of the Genocide Convention made by the association's special committee on peace and law through United Nations, I wish emphatically to deny that the bar association or this special committee has, or is conducting any campaign against the Genocide Convention or against the outlawing of genocide as a crime under international law in the true meaning of the term "genocide" and as the public understands it to mean. We are performing what we consider to be a duty of the legal profession, as well as a patriotic service, in bringing to the attention of the Senate the views of a great body of American lawyers upon the real meaning and interpretation of a treaty the Senate has been requested to approve.

The special committee of the bar association has been in existence for a number of years and was established for the specific purpose of cooperating in the maintenance of peace through law, which objective I humbly submit is the only method by which peace can be justly maintained. Each year for several years, the special committee has taken up different subjects for consideration and has held regional group conferences on them by members of the bar in many cities and section of the United States. The consensus of the groups was later formulated and reported to the American Bar Association.

*Member, Special Committee on Peace and Law through
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REGIONAL CONFERENCES

During the preceding year, regional group conferences were held on the proposed Covenant on Human Rights and the Genocide Convention. These subjects were fairly presented from all angles and representatives of the State Department and the Department of Justice were invited to attend, and did attend some of the conferences, at the expense of the American Bar Association. They had every opportunity to present their views to the lawyers of the country. The report of the special committee on the Genocide Convention was made to the last annual meeting of the American Bar Association held in St. Louis in September last. It was thoroughly debated by the house of delegates and those opposed to the recommendation of the special committee were given full time to state their views. The opposition to the special committee's recommendation was led by the Solicitor General of the United States. In spite of everything said against the special committee's report, its recommendation that the Genocide Convention as submitted to the Senate be not approved was overwhelmingly adopted by the house of delegates.

CONVENTION BEING MISREPRESENTED AND OVERSOLD

Yesterday, before this subcommittee, in the criticism leveled against members of the special committee by those urging the ratification of the Genocide Convention as submitted, it was charitably suggested that while our members are, no doubt, honest and sincere, their attitude was probably due to a latent and subconscious allergy to international cooperation for the promotion of peace. I wish to assure this subcommittee that I am not only not allergical to international cooperation for this purpose, but have spent substantially all of my life in seeking to promote it by practical and rational means. I believe that accomplishments in this field have been retarded by the overselling to the public of the results and accomplishments of international conventions and conferences. The Genocide Convention as submitted to the Senate, is an outstanding example of an international agreement upon which the public has been and is being misinformed.

As genocide is defined in the convention, it does not apply to the mass killing and destruction of peoples by totalitarian governments, but appeases such governments by making it possible for them to continue as they are doing today behind the iron curtain, without the possibility of bringing legal or moral charges against them for violating this convention, even if they had ratified it, the monstrous treatment of thousands of human beings whom those governments regard as enemies of the Communist states, the same as Hitler and his conspirators treated certain groups in Germany and in occupied countries as the enemies of nazism. The present convention accordingly frustrates the wishes of all civilized people who sincerely believe that genocide as thus truly understood should be outlawed by international law. There is not a word in the convention which denounces as genocide the mass killing and destruction of peoples by governments. The only article in which the responsibility of a government is mentioned is article IX, and as to that article the Secretary of State has recommended that the Senate insert an "understanding" in its resolution of approval relieving the United States Government from respon-

sibility, except, as I shall later point out, its responsibility under the rules of international law already binding upon it and for which no no new convention is necessary.

TREATIES UNDER THE CONSTITUTION

With the exception of the matters referred to in the following two paragraphs I make no argument that this convention is unconstitutional. My criticism is based upon the effect of treaties upon our State laws and constitutions and of the recognized rule of international law that domestic matters become matters of international concern when treaties are made on such subjects. I am opposed to the continuance of the policy made possible by the decision of the Supreme Court of the United States in the case of *Missouri v. Holland* (252 U.S. 416) of transferring State powers to the Federal Government through the exercise of the treaty-making power as a method of amending the Constitution. I am also opposed to the policy of nullifying article II, paragraph 7, of the Charter of the United Nations which expressly prohibits that organization from intervening in matters which are essentially within the domestic jurisdiction of the country by making treaties with other nations on subjects which are now and ought to remain within our domestic jurisdiction in accordance with the constitutional distribution of powers between the States and the Federal Government. On the effect of treaties relating to matters of domestic concern, see the opinion of the Permanent Court of International Justice at The Hague in the Tunis-Morocco Nationality Decree case, Hudson, World Court Reports, volume I, page 143.

INTERNATIONAL PENAL TRIBUNAL

Article VI of the convention provides that persons charged with genocide shall be tried by a competent tribunal of the state or the territory in which the act was committed. This is an eminently proper provision and I would make no further comment upon this article had it ended here; but this article continues "or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction." It is argued that since there is no international penal tribunal now in existence, and since the United States does not propose to accept the jurisdiction of such an international tribunal should one be established, the proposal of this alternative procedure for the punishment of persons charged with genocide is innocuous to this country. This argument fails to take into consideration the statement of an official representative of the United States in the Sixth Committee of the General Assembly of the United Nations at Paris, October 14, 1948, in which he gave this pledge to the other nations taking part in that meeting:

The United States delegation intended, at a later stage, to show the need for the establishment of an appropriate international tribunal.

Records of the third session of the General Assembly, part 1, page 103; quoted in the report of the special committee for peace and law through United Nations, page 12.

How can it be seriously argued that if the United States proposes to establish an international penal tribunal, as promised by its official representatives at Paris 2 years ago, the Government of the United

States will not be bound to make a bona fide attempt to become a party to such international tribunal. Any proposal to send for trial without the limits of the United States any person charged with crime committed within the United States would be clearly unconstitutional. This method of punishing the colonists was one of the particulars of complaint made against King George III in our Declaration of Independence: "for transporting us beyond seas to be tried for pretended offenses." When our forefathers obtained their liberty from this and other acts of tyranny, they sought to ban forever that method of punishment by providing in article VI of the Bill of Rights that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

In order that my objection thus stated to the establishment of an international court may not be misunderstood, I would like to emphasize that what I have just said on that subject refers only to the proposal to establish an international penal tribunal before which individuals committing crimes in this country may be personally tried. If the Senate of the United States had before it a convention outlawing genocide committed by governments or with governmental connivance or acquiescence, which is the true meaning of the term and which the public thinks is being outlawed by the convention now before the Senate, I would gladly appear before you and as earnestly urge the approval of such a treaty as I am now as earnestly urging the Senate not to ratify the present treaty as submitted. I agree with the proponents of the present treaty who have repeatedly stated before you that genocide properly defined has never occurred in the United States and I am confident it never will; but I am not willing by the ratification of the present treaty to give the enemies of our form of government abroad and its critics at home any foundation to argue that our Bill of Rights and our State constitutions and laws for the protection of individual rights are not adequate or are being so administered as to stigmatize us with the commission of the crime of genocide while under the same convention the accusing governments may not be charged with genocide in its true sense. I would like to see the United States Government take the leadership in proposing the outlawry of genocide when committed by governments as a matter of policy or by their connivance or acquiescence. I would also like to see included in the same convention, a commitment by the signatories to prevent and punish that kind of genocide within their territories whether committed by public officials, private individuals, or groups of individuals.

Moreover, I would be willing that any serious charges against our Government by any other contracting power of serious violation of such undertakings be submitted to the International Court of Justice at The Hague without reservation of any kind. I say this because I am confident that genocide as the world understands that term to mean will never be committed in this country; but if, unfortunately, our moral and legal standards should so deteriorate that we are open to the charge of following the example of Hitler and Stalin, we should be willing to submit the decision of such a charge to the bar of international justice and world opinion.

DEFINITION OF GENOCIDE INADEQUATE TO MEET THE SITUATION

The crux of the criticism of the convention now before the Senate is the definition of genocide contained in article II. The first paragraph of that article reads: "In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such." Article IV limits the application of the convention to persons committing genocide. We are accordingly at the outset met with a bar against accusing governments, totalitarian or otherwise, of genocide. In this respect the convention is a departure from the approach to the crime of genocide with which the United States Government started the negotiations which led to the signature of the convention. As will be seen from the proceedings of the Ad Hoc Committee of the Economic and Social Council of the United Nations, the representative of the United States in that Committee insisted that genocide could not exist except with governmental approval, connivance, or acquiescence. For reasons best known to our own Government officials, this approach was later abandoned and we are now presented with a convention dependent for its efficacy upon the punishment of individuals in national courts.

Furthermore, the convention provides that these acts of individuals shall be committed with intent to destroy a protected group "in whole or in part." The question immediately arises, Is the killing by an individual of one or two members of a group with intent to destroy those members as part of the group, regarded as genocide? In order to meet this difficulty, some of the proponents of the convention now seek to escape it by arguing that the intention must be to destroy the whole group. This is equally untenable. How could an individual or group of private individuals undertake to destroy a whole national, racial, ethnical, or religious group within the country without governmental approval, connivance, or acquiescence?

Moreover, article II enumerates a series of acts of genocide, including "mental harm to members of the group." Can it be successfully denied that segregation laws are susceptible of being denounced as causing mental harm to all members of the group against which such laws discriminate? Minority groups in this country are now vigorously seeking to have such discrimination abolished by Federal legislation. Can there be any reasonable doubt that if Congress fails to enact the civil-rights laws now being urged upon it and if this convention is ratified as submitted, members of the affected groups will be in a position to seek legal relief on the ground that this so-called Genocide Convention has superseded all obnoxious State legislation? By the United States Constitution, treaties are "the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (Art. VI, sec. 2):

DEFINITION DOES NOT COVER ACTS OF THE TOTALITARIAN GOVERNMENTS

The nonapplicability of the convention to crimes of genocide now being committed by totalitarian governments behind the iron curtain is further emphasized by the requirement of article II of the convention that acts of genocide can be committed only against a national, ethnical, racial, or religious group, as such. The inhuman treatment

now being administered to members of these groups behind the iron curtain is said to be, not because they belong to any of the groups protected by the Genocide Convention, but because they are enemies of the state or dangerous to its security. The omission of political groups from the definition of genocide in the convention has made this evasion possible. The original resolution on genocide of the General Assembly of the United Nations dated December 11, 1946, included the protection of political groups but such groups were omitted from the convention as it is now before the Senate. The effect of this omission and of the nonapplicability of the convention to governmental acts was shown in a letter sent to the Secretary General of the United Nations in September 1949, by the American Jewish League against Communism, protesting against the deportation of 400,000 Jews from the Ukraine and White Russia to Archangel and Siberia because they were considered too prodemocratic to be left on the Soviet borders in case of war. See *New York Times*, September 15, 1949, page 24. The futility of the convention to offer any protection against such cases of real genocide is further substantiated by the report of the *New York Times* correspondent in Washington of October 17, to the effect that the State Department has received confirming reports that Russia is carrying out the mass deportation of Greeks and other non-Russians from the Caucasus area. See *New York Times*, October 18, 1949. Moreover, an Associated Press dispatch from Berlin of January 21 of this year, reports that about 24,000 persons have died in the Buchenwald concentration camp since it has been operated by the Soviets for political prisoners.

Of what avail to any of these poor unfortunate people will be this convention on genocide under which the only possible effective sanction will be the punishment of individuals by national courts? What can a national court in a country behind the iron curtain do to prevent genocide as defined in this convention? What real protection could the court of any country provide if an independent judiciary does not exist?

ARTICLE IX

The only other article of the convention upon which I desire to comment is article IX. This article provides that—

disputes between the contracting parties relating to the interpretation, application, or fulfillment of the present convention, including those relating to the responsibility of a state for genocide . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

The Secretary of State has requested the Senate to insert a qualifying understanding that this article shall be understood—

in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals.

The effect of this understanding would be to relieve the United States Government of responsibility under the convention for damages to its own citizens. No such liability would exist without the convention. The understanding would retain the liability of the United States Government for damages to aliens in this country. Such a liability now exists under international law and no convention is necessary. Article IX obviously would be interpreted by the courts

to include civil liability of individuals for violations of the convention. The reservation proposed by the Secretary of State does not touch the question.

The United States is already a party to the statute of the International Court of Justice and to the optional clause contained in article 36 of the statute which confer jurisdiction upon the Court in such legal disputes as might arise under the Genocide Convention. The United States acceptance of the optional clause contains the so-called Connally reservation that in the event of a dispute as to whether the International Court has jurisdiction, the matter shall be settled by the United States and not by the Court. Article IX of the Genocide Convention is not necessary to confer jurisdiction upon the International Court. Its acceptance without further reservation than that recommended by the Secretary of State would serve to eliminate the Connally reservation from disputes arising under the Genocide Convention. We do not discuss at the present time whether or not the Connally reservation should be retained; that question should be discussed on its merits, but the reservation should not be bypassed collaterally in the convention now before the Senate.

The United States Government ratified the Charter of the League of Nations with the provision in article II, paragraph 7, that the Charter should not apply to domestic questions. The protection of civil rights and the suppression of crime within the territory of a state are universally considered as questions within its domestic jurisdiction. In the United States they are primarily within the jurisdiction of our States. When a government enters into treaty relations with another government or governments on a subject within the domestic jurisdiction, such subject ceases to be a matter solely of domestic concern and becomes a matter of international concern. See the case of the Tunis-Morocco Nationality Decrees cited. By entering into the Genocide Convention on subjects which fall within the protection of civil rights or the police power of the States or the Federal Government, the United States will be subjecting its domestic jurisdiction to the concern, not only moral but legal, of the other contracting governments; and be thereafter subject to diplomatic interposition and other procedures established for the settlement of international disputes. The ratification of the present Genocide Convention will raise to the level of an international question many questions now reserved to the domestic jurisdiction. It is submitted that such a result will not be in the interest of preserving peace but of creating additional frictions which might lead to war.

CONVENTION OF NO USE IN THE COLD WAR

It is argued that the ratification of this convention as submitted will aid the Government's policy in the cold war. As pointed out, the Communist world has already won its cold war against the western powers with respect to the punishment of genocide. The convention as submitted could not be more perfectly drafted to enable the totalitarian governments to proceed against their minority groups the same as Hitler did. The convention is supposed to implement the Charter of the United Nations which requires the members to promote universal respect for and observance of human rights and fundamental freedoms, article 55. The convention will actually weaken the protection now provided in the Charter.

Also, it is argued that the ratification of the convention will prevent future war criminals from pleading, as they did at Nuremberg, that there was no law on the subject of genocide. This argument is one of despair. The purpose of the Genocide Convention is to assist in preventing future war. If its effect is not to be felt until after another world war has been fought and won, then, I submit, we are wasting our time in discussing it.

CONVENTION OF NO VALUE IN THE UNITED STATES

As previously pointed out, it is argued that the convention will have no application to the United States because genocide has never been committed in this country and it is hoped never will be. In view of the patent futility of the convention to prevent the mass destruction of peoples in countries with totalitarian governments, if the convention has no real application to the United States, as asserted, no reason remains why the Senate should run the risk of having the convention interpreted, if not by us then by one or more of the other contracting powers, as being applicable to domestic questions in the United States.

In former years it was the practice of American delegates to international conferences to decline to sign international conventions which would or might require the Federal Government to assume responsibility for matters falling within the jurisdiction of States of the Union, or to attach appropriate reservations safeguarding the rights of the States. I refer particularly to the code of private international law adopted in treaty form by the Sixth International Conference of American States held at Habana early in 1928. This treaty contains international commitments on many phases of law and procedure affecting the private lives of the people. It covers such matters as marriage and divorce, real and personal property rights, contracts, wills, negotiable instruments, sales, penal law, and many other subjects. As to that convention, the delegation of the United States—

found it impossible to vote on the code and thereby treat of questions which were of a domestic character and pertained to the jurisdiction of the 48 States, which had their special internal regulations on these matters (*Diario de la VI Conferencia Americana Internacional, Habana, 1928, p. 92 (translation)*).

The Genocide Convention is the beginning of a series of treaties which the Senate will have to consider involving wider participation by the United States in international cooperation. As my colleagues on this committee have already pointed out, no attempt has been made in this treaty to safeguard the jurisdiction of the states over common-law crimes and civil responsibility resulting therefrom where such crimes may also constitute genocide under this convention. In that respect I regard the Genocide Convention as a further attempt on the part of the Federal Government to increase its power at the expense of the States.

I would like to give the ladies in the audience a bit of free legal advice, should the Senate put its approval upon this form of Federal legislation by treaty. Some of their organizations are now trying to get the Congress to agree to an amendment to the Constitution giving them what they call equal rights. Should that amendment pass the Congress and its backers be unable to obtain its ratification by the State legislatures, as required by the Constitution, then they would

have an easier method of making it the law of the land by having the United States Government enter into a treaty on that subject. Such a treaty is already in existence for several Latin-American Republics. It was signed during the Seventh International Conference of American States held at Montevideo in 1933.

(Genocide Convention, hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 81-2, January 23, 24, and February 9, 1950, pp. 213-221.)

HUMAN RIGHTS

By Carl B. Rix

(At an annual meeting of Law Society of Massachusetts,
on January 5, 1950)

The traditional concept of international law was that of the relation of states to each other, as *inter se*. The relation of sovereign to sovereign. A determined effort is now being made, following the Nurnberg trials, to change that concept to the relations of states and individuals in the states, thereby imposing individual liability for international law and creating unknown individual rights. The concept has been broadened also in the language of the subjects to be covered. For instance, human rights have never been considered to be international in scope. Dr. George Malik, Minister of Lebanon in the United States, and Rapporteur of the Human Rights Commission, and Mrs. Roosevelt recently issued a bulletin on the Covenant of Human Rights in which Dr. Malik says:

"These rights and freedoms have hitherto fallen exclusively within the domestic jurisdiction of the separate states but the covenant will have the effect of lifting them from being the independent and exclusive concern of the separate sovereign states to being the common concern under international law of all the covenanting states."

This means that if domestic questions are made the subject of a treaty, they thereby become part of the structure of international law. If to that is added the theory of individual liability instead of liability only of a state, it is easy to see the extent of the damage which will come to us and other nations.

Article 27 of the Charter of the United Nations provides:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter."

4 In order to get away from this provision and to deal with domestic questions, it has been found necessary to change those questions to international law by the use of treaties. A considerable number of treaties of that kind have been proposed and are now under preparation in the United Nations.

This situation has made it necessary that we go back to the Constitution of the United States to discover the impact of the new doctrine on us. Article VI of the Constitution provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Few countries of the world have similar provisions in their constitutions and it may be said that the United States occupies an isolated status and the way has never been found by which we can be put on an equal basis with Great Britain and many other countries in treaty law.

The situation of the United States may be summarized thus:

(a) In a treaty in a code form, the Senate by a two-thirds vote of the Senators present and approved by the President, may impose domestic law on the United States in any form and on any subject if there is no prohibition in the Constitution, regardless of the entire lack of any other constitutional basis.

(b) After ratification of a treaty and approval by the President in a skeleton or enacting form only, which does or does not provide for implementation, Congress has the power with no other constitutional basis whatsoever to pass any implementing legislation, with the approval of the President.

(c) The effect of the above is that a ratified treaty confers full and complete power on the Federal Government in matters dealt with by the treaty and the States are deprived of all the power in those matters notwithstanding State constitutions, State decision, and laws.

This is a policy question which must be discussed. If there is to be a succession of treaties from the United Nations dealing with domestic questions, are we ready to surrender the powers of the States over such matters to the Federal Government? Is that the road to peace, domestic or foreign? We hear much of the dominant Federalist State. Everything done so far has been done under the constitutional power of Congress. If no constitutional basis is necessary, and if all that is necessary is a ratified treaty, shall we make that change in our structure of government by the treaty route instead of a constitutional amendment approved by the people of the United States?

The report of the Civil Rights Committee appointed by the President, after considering the division of power over civil rights between the Federal Government and the States, in two places refers to the added power which may be given to Congress in the field of civil rights if the human rights treaty is ratified and approved.

Last year a bill emanated from the Labor Committee of the House dealing with the entire field of civil rights. It is predicated on the provisions of the Charter of the United Nations dealing with the promotion and support of human rights generally. The report of the Labor Committee says boldly that no other constitutional basis is necessary than the Charter of the United Nations, which is a treaty.

These are constitutional processes in the United States. Is there a blind spot in the Constitution? At the time it was drawn, and for years thereafter, operations were under a narrower concept of international law. The result could not have been foreseen. It has been brought to the fore by the proposed Covenant on Human Rights, the Genocide Convention, and the proposed treaty on traffic in persons. During the annual meeting of the American Bar Association in consideration of these matters, Governor Stassen joined in a suggestion of the Committee on Peace and Law through United Nations that if the United States was called upon to consider and ratify many proposed treaties flowing from the United Nations dealing with domestic questions, a constitutional amendment would undoubtedly be necessary to put us on a parity with other nations and to preserve the rights of the States.

There is one outstanding case in the United States by which a domestic question was turned into international law. Congress passed a migratory bird

law which was declared unconstitutional because of lack of constitutional power in Congress to deal with that subject. On the advice of counsel no further action was taken until a treaty covering migratory birds was made with Great Britain and Canada. The matter then reached the Supreme Court of the United States in what is now known as the Migratory Bird case, and the power of Congress to enact the law under the treaty, with no other constitutional basis, was upheld because, as Justice Holmes said, there was no prohibition in the Constitution against it and nothing in the tenth amendment to prevent it. A comparatively simple subject made a lot of law for the United States, the effect of which we must now consider.

It will be seen that the Committee on Peace and Law through United Nations is presenting nothing new. It is presenting a situation under our Constitution which has existed since it was drawn. Many attempts are now being made to recognize the situation. The report of the Committee on Peace and Law through United Nations presented in September at the annual meeting of the American Bar Association has been sent to each member of the association for earnest study and consideration. It is in the hands of Senators and Members of the House. Its substance has been presented to the American Society of International Law and to teachers of constitutional and international law at the meeting of the Association of American Law Schools.

At the last meeting of the Assembly of the United Nations a report of Committee Three was submitted constituting a convention on the traffic in persons, generally known as the treaty on prostitution. In her daily column Mrs. Roosevelt said:

"The United States abstained because the Federal-state clause was not included, which probably made it impossible for Congress to ratify this convention."

We think it will be agreed that the question of prostitution hitherto has been a domestic question, treated through local regulatory measures and in the social-service fields in each separate jurisdiction of government.

The Federal-state clause referred to is article 24 of the proposed treaty on human rights. Its purpose is to preserve the rights of the states. The draft is an abridgment from the International Labor Convention, under which proposals only are made to the treaty states for acceptance or rejection by them, with no binding obligation of implementation of the treaty. We believe it is now agreed that the clause as drawn will not serve the purpose.

No attempt whatsoever is made in the Genocide Convention to meet the situation. In fact, a deliberate, premeditated attempt to enact international law for enforcement in domestic courts appears in that convention. If Mrs. Roosevelt is right in her statement that the absence of the Federal-state clause probably makes it impossible for Congress to ratify the Convention on Prostitution, what shall be said of the absence of a similar clause in the Genocide Convention?

It is often said that the treaties are not self-executing. In the solution of this question there is no difference between a self-executing treaty, which does not require implementation, or one which requires implementation by the enactment of the necessary laws to put it into operation. If there is an obligation to implement a treaty, the obligation is as strong as the treaty itself. The United States does not fail to implement a treaty. If there is an obligation to pass legislation the point is reached when such legislation is passed that the full effect of the treaty shown herein has been accomplished.

Three salient problems are still to be solved in the drafting of the Human Rights Convention—

1. Accommodation to the constitutional system of the United States, the necessity for which is shown by the foregoing.
2. Restrictions by the majority on the right of free speech or freedom of the press.

Your own Mr. Canham who, with other leading citizens of this country has labored valiantly to secure a treaty on public information, is entirely familiar with this situation. It is described fully in the Department of State Bulletin of November 14, 1949. The effort to secure that treaty went on the rocks for the time being because it was found that a majority of the states would not give up the right of supervision of the press if the interest of the states was involved. The United States, Great Britain, and other nations could not agree to that concept of free speech and freedom of the press. The entire matter was given up for the present and it was referred to the Commission on Human Rights, which was awaiting the efforts in reference to the treaty on public information before

formulating provisions in these matters in the human rights treaty. It is evident that the same difficulties will arise in the Human Rights Commission.

3. The right to file individual petitions claiming violations of the treaty of human rights.

The United States, Great Britain, and other nations have taken the position that such right is to be limited to the states bound by the treaty; that individuals shall not have the right to petition for violations in their own and other countries. The last vote in the Commission was a tie. It will be extremely interesting to see what the next vote will be.

The committee believes that the United States cannot and will not recede on these matters and that it should not recede.

Many other interesting questions arise in the consideration of these matters, including the right of a state which is a party to a treaty to raise the question of the constitutionality of any of its acts. Articles 13 and 14 of the proposed declaration of the rights and duties of states are to the contrary. If individuals are bound by treaties, and the treaty state cannot raise the constitutionality, will the individual have the power to raise the question of constitutionality? This is of particular importance because of the provision of our Constitution which provides that the Constitution of the United States and treaties are of equal dignity as supreme law of the land. Which is supreme?

Another question is, Have the Senate and the United States and the President the power to suspend the operation of a plain provision of the United States that a ratified and approved treaty becomes domestic law? Will any resolutions or reservations saying that this treaty shall not have that effect stop the operation of the Constitution?

Finally, may we call attention to the evanescent and uncertain character of legislation dependent on the termination of a treaty. Great bodies of legislation may be passed under these treaties and great agencies of enforcement may be set up. Treaties may be terminated in many ways by the President, by Congress, by repudiation and abrogation, by failure to act, or by deliberate breaches. What becomes of the laws and the machinery which has been set up? Those interested in this point are referred to Corwin—The President, Office and Power, page 238.

(Genocide Convention, hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 81-2, January 23, 24, 25, and February 9, 1950, pp. 185-188.)

SERIOUS PROBLEMS RAISED BY THE GENOCIDE CONVENTION

By Alfred J. Schweppe*

I appear as Chairman of the American Bar Association's Committee on Peace and Law Through United Nations, and am accompanied by two associates on the Committee; by Mr. Carl B. Rix, of Milwaukee, Vice Chairman and former Chairman of our Committee, a former President of the American Bar Association, and by Mr. George A. Finch, of Washington, D.C., who is Editor-in-Chief of the American Journal of International Law, Professor of International Law, a former member of the State Department, a member of both our Committee and also of the Section of International Law of the American Bar Association, which has been repeatedly mentioned in this hearing, and one of this country's eminent international lawyers, one who lives a quiet, scholarly life in the Nation's capitol, but whose counsel is widely sought by informed men throughout the country.

For your information, the American Bar Association's Special Committee on Peace and Law Through United Nations was formed some years ago to support the work of the United Nations and to make studies of its activities, with a view to assisting that body and the State Department in promoting peace and law throughout the world. The Committee was originally and until his death, about a year ago, headed by Judge William L. Ransom of New York City, one of this country's most distinguished lawyers. Throughout the period of formation of the Statute of the World Court, the charter of the United Nations, the work for Codification of International Law, the formative days of the United Nations, and in

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the organization of group conferences of lawyers throughout the country to study and forward the work of the United Nations, and to guide the actions of the House of Delegates of the American Bar Association in matters pertaining to the United Nations, Judge Ransom was a great leader. On his untimely death he was succeeded as Chairman by Mr. Carl B. Rix of Milwaukee, a veteran member of the Committee whose name appears as Chairman on the last printed report of the Committee, to which frequent reference has been made here. Mr. Rix retired as Chairman last fall, though consenting to remain as Vice Chairman; and now the responsibility of Chairman has fallen on me, a grass roots lawyer from Seattle, Washington, where the roots strike deep and where the grass, unlike that in our good neighbor state of California, is green the year around.

The Committee on Peace and Law consists of nine persons, three of whom are here present and will state their views. The other members now are United States Circuit Judge Orie L. Phillips, of Denver, Colorado, Thomas J. Dodd, of Hartford, Connecticut, Cody Fowler, of Tampa, Florida, Judge Nathan L. Miller, of New York City, Gerald Schroeder, of Detroit, Michigan, and James C. Sheppard, of Los Angeles, California. This Committee held regional conferences on the Statute of the World Court and the Codification of International Law, and on its recommendation this work of the United Nations was supported by the House of Delegates of the American Bar Association. It last year held regional conferences on the proposed Covenant on Human Rights and on the Genocide Convention in sixteen cities throughout the country for the purpose of ascertaining the views of the bar on these proposals. Contrary to a suggestion made in this record by one of yesterday's spokesmen, these regional conferences were serious study groups led by such informed men as Judge Manley O. Hudson, of Harvard, long a Judge of the World Court, U.S. Circuit Judge Orie L. Phillips, Carl B. Rix, George A. Finch, Frank E. Holman, former President of the American Bar Association, and others. These regional conferences are not for propaganda, but for study and analysis, with a view to appraising and assisting the work of the United Nations and the position of the United States in that work. The Committee is uncompensated and devotes many days each year to its work. This outline is presented partly

to give you a picture of the work of the Committee, partly to make it clear that the Genocide Convention is but one phase of its work, and partly to indicate that the field of the Committee is such that you will probably be hearing from it from time to time in the future, as the Senate has in the past.

I am proud to be here as a member of what in this hearing appears to be the somewhat unpopular Committee on Peace and Law of the American Bar Association. We hold no feeling of resentment about these criticisms, which we know are born of zeal for a noble cause, and are the sort of things that lawyers living on life's firing line often hear and are thoroughly used to. I am proud, in part, because the position of our Committee has apparently been responsible for bringing to your Subcommittee much discussion from proponents of this convention, which, except for our Committee Report and the action of the House of Delegates of the American Bar Association, your Subcommittee might not have had. Honest criticism such as made by our Committee, and the argument which it has provoked, is bound to bring these problems into sharp relief and to assist you gentlemen in formulating your conclusions.

I am proud, further, because the only purpose of our studies has been to be of impartial and constructive assistance to the State Department and to the United States Senate in arriving at informed conclusions. We have no axe to grind and no weapons to wield except the validity of our arguments. We offer no propaganda and ask nothing except that the United States Senate base its decision upon full knowledge of all the pertinent considerations. By that decision we shall abide, and will probably be back another day to advise with you on other problems.

Like yourselves, we are proud of the United States of America, of its form of government, and of its position in the world; and anything we say is offered in a spirit of love for our country and the preservation of peace and law everywhere.

For my part, I yield to no one in my opposition to genocide or in my desire to have Jews, persons of color, and other minority groups receive fair treatment throughout the world. I have a law

partner who is a Jew and he is my partner by my own choice, one of the finest men at our bar. I was for some years an official of the Urban League of Seattle, devoted to the advancement of colored people. I have at times represented the American Civil Liberties Union to preserve the essential freedoms of the Bill of Rights. I say these things, not to bore you with a recital of my social interests, but solely to show that anything I, or our Committee, has to offer is predicated not on bias, prejudice or timidity, but solely on views which are honestly entertained and which we are prepared to discuss in a climate of complete intellectual dignity and impartiality.

We start out, then, with the concept that we are all vigorously opposed to genocide. Any other suggestion about any citizen of the United States would strike me as an unworthy suggestion, born of momentary emotionalism. But our problem is whether the instrument before you is the one by which we shall accomplish the prevention of genocide, and whether we render a service to the American people and to the world by ratifying this convention as submitted.

With respect to my ensuing remarks, I want to say that I speak here solely as a member of the Peace and Law Committee of the American Bar Association. I do not speak for the American Bar Association as such, since it speaks officially only by formal action, as does the United States Senate. Its only official action has been an official resolution, of which your Subcommittee has copies, and in which it is resolved by the House of Delegates, the official voice of that Association, "that the convention on Genocide now before the United States Senate be not approved as submitted".

For the record, I here offer a copy of this resolution of the House of Delegates, and also a copy of the Report of the Special Committee on Peace and Law which constitutes a part of the background for this resolution....

* * * * *

Something has been sought to be made of an alleged conflict within the American Bar Association as between the Committee on Peace and Law, on the one hand, and the Section of International Law, on the other hand.

Actually this so-called conflict is for our purposes here largely formal. The Section whose resolution you have before you at the direction of the House of Delegates of the American Bar Association (the House of Delegates desired the United States Senate to have the fullest information possible) recommended ratification of the Genocide Convention, with seven reservations. The Peace and Law Committee recommended against ratification as submitted, believing that the reservations so emasculated the convention as to leave nothing substantial, and that it was more forthright to say that this convention as submitted should not be ratified. It was also believed by us that it would be better to have the convention sent back to the United Nations for appropriate changes. The House of Delegates of the American Bar Association voted down the recommendations of the Section with its seven reservations, and, by an overwhelming vote, resolved officially that the convention should not be ratified, as submitted. Incidentally, the Solicitor General, Mr. Perlman, made an impassioned plea before the American Bar Association in support of the Section report. I suggest that you examine the resolution of the Section which Mr. Perlman so fervently supported. It will amaze you.

So far, then, as the rather startling position taken yesterday is concerned—taken by Judge Patterson and others—that the United States Senate ratify without reservations, you have the united objection of the House of Delegates of the American Bar Associa-

tion, of its Committee on Peace and Law, and of its Section of International Law, including Mr. Perlman. In fact, the State Department has in its letter of transmittal made one important reservation, which my colleague Mr. Finch will discuss later. This united opinion of the mentioned lawyer groups may perhaps not persuade you concerning the form and content of this convention, but I know you will carefully weigh it for what it is worth. After all, we are not talking here about general moral principles, as many of the good people who have appeared here seem to think. We are talking about a specific legal document, intended, if ratified, to be legally binding upon the United States of America.

I have had the misfortune, apparently not shared by some of my colleagues at the bar who testified yesterday, of having spent a number of days in reading the United Nations record on the Genocide Convention, first in the Ad Hoc Committee, which prepared the initial text, and later in the Sixth or Legal Committee, which prepared the final draft that was approved by the General Assembly. Upon an examination of this record, one is struck very early with the discovery that the United States representatives were pretty promptly outvoted on what they deemed a fundamental—a *sine qua non*—of a proper definition of the crime of genocide, namely, that genocide could not be an international crime except "with the complicity of government".

Mr. Makos of our State Department was Chairman of the Ad Hoc Committee and, on April 15, 1948, put the official United States position into the record, as follows:

"The CHAIRMAN, speaking as the United States representative, proposed adding to the definition of genocide, which had been agreed upon at the previous meeting, the words, 'with the complicity of the Government'. The United States delegation felt in fact that genocide could not be an international crime unless a Government participated in its perpetration. In introducing this amendment, Mr. Makos in no way wished to exempt from responsibility or excuse from punishment individuals not directly connected with a Government. But the common law of every country covered crimes not committed with the complicity of the Government. Here was a condition *sine qua non* of genocide which should be inserted in the definition."

This position, which was also later the British position, was voted down.

Further, Mr. Maktoz proposed on behalf of the United States the inclusion of "political groups," which had been included in the General Assembly resolution of December 11, 1946. This position, it will be noted later, was at first approved in the Sixth Committee, over the opposition of Russia, and its satellites and a few others (I shall give you the vote subsequently) and then the Sixth Committee reversed itself and excluded "political groups."

As I shall again suggest a little later, the instrument with which our delegates came home, over their firm convictions on matters of principle, did not bear much resemblance to the convention they advocated. The losses which our representatives suffered are part of the reasons why our committee thinks the convention should not be ratified as submitted; but before doing so, I wish to touch briefly on our own constitutional situation, as background for some further observations by myself and my two colleagues.

By reason of Article VI of the Constitution of the United States, making ratified treaties the supreme law of the land, superior to all state laws, and coordinate with the Constitution itself and acts of Congress, one serious objection to the Genocide Convention is that it seeks to impose domestic law on the United States by the treaty method and takes away from the individual states of the United States the jurisdiction which under the Constitution they have always had. The United States appears to be the only country where this unusual and difficult constitutional problem exists, except possibly France. In other countries, ratification of a treaty does not make it domestic law automatically binding on all domestic courts, unless additional local legislation makes it so.

In this connection, and as logically bearing on the Genocide Convention, attention is called to a statement contained in Mrs. Eleanor Roosevelt's syndicated column "My Day" for December 5, 1949. Mrs. Roosevelt is a United States representative to the United Nations General Assembly and Chairman of the Human Rights Commission of that body. She pointed out in her column that day that the United States had refrained from voting on the

Convention on Traffic in Persons (directed against prostitution) because the proposed convention did not contain the so-called "federal-state clause". She said:

"Of the last three items before our committee Three we voted first on the convention on the traffic in persons. The United States abstained because the federal-state clause was not included, *which probably made it impossible for Congress to ratify this convention . . .*" (Emphasis supplied).

The Genocide Convention, being one of the first products of the United Nations, does not contain the so-called "federal-state clause". This clause came into being later only after vigorous attention was called by members of the American Bar Association, to the unbalancing of our own constitutional system that would result from the ratification of treaties relating to human rights and genocide—treaties which on adoption would become automatically the "supreme law of the land" and would be imposed on our states and people as immediately operative domestic law, creating civil as well as criminal liability. Incidentally, none of the proponents yesterday discussed civil liability of individuals under this convention, which arises automatically upon ratification, because violation of a criminal law is also an actionable tort. (See Restatement of Law of Torts, Section 286, by American Law Institute; see *Kardon v. Gypsum Co.*, 69 F. Supp. 512.) The State Department's proposed reservation recognizes the existence of civil liability. This "federal-state clause" is now contained as Article 24 of the current draft of the proposed International Covenant on Human Rights. (Draft of June, 1949 prepared by United Nations Commission on Human Rights—see State Department Bulletin, July 11, 1949). Thus, in the draft of the International Covenant on Human Rights an effort has been made to recognize the constitutional problems which arise in the constitutional system of the United States, but no such effort was made in the drafting of the Genocide Convention. Obviously, Mrs. Roosevelt's statement above quoted, concerning the Convention on Traffic in Persons, as a matter of logic, applies equally to the Genocide Convention, which does not contain the "federal-state clause", and thus "probably made it impossible for Congress to ratify this convention".

Further, as to the form of the Convention as submitted, while the Genocide Convention idea was conceived to prevent the repetition of the atrocious crimes in the form of mass murder committed against humanity by Nazi Germany, the text presented actually goes far afield of that goal in that among other things, (a) government complicity was not included as an essential of the definition, thus leaving only a group of domestic common law crimes (see Mr. Maktos' statement, *supra*), and (b) "political" groups were not included, and (c) national, ethnical, racial and religious groups are merely included "as such", and (d) "mental harm" as well as "bodily harm" is included. It also includes a "part" of a group which, of course, may embrace a single person, as recognized in the State Department's formal letter of transmittal. In consequence of (b) and (c) the proposed convention does not prohibit the only important genocide now going on, viz., in those countries where dissident groups and persons are regularly proceeded against on political grounds as enemies of the state. In fact, the discussions, in the Sixth Committee of the United Nations General Assembly, which prepared the final text of the Genocide Convention, affirmatively show that under leadership of the United States and some other countries "political groups" were at first included (as they had been included in Resolution 96 (I) of the General Assembly of the United Nations originally sponsoring a genocide convention) over the dissent of Soviet Russia and satellite countries, aided by the votes of smaller nations, principally from Latin and South America (Soviet Russia, Poland, Ukraine, Byelorussia, Czechoslovakia, Uruguay, Venezuela, Argentine, Brazil, Dominican Republic, Iran, Belgium—see vote in Official Records of Third Session of General Assembly, Part I, Legal Questions, Sixth Committee, Seventy-Fifth Meeting), but that Committee finally reversed its previous action of including "political groups" and excluded them from the draft finally adopted. Representatives of the United States at last yielded, although they maintained that as a matter of sound principle and to make the convention really effective, political groups should be included. (*Ibid*, 128th Meeting.)

The omission of "political groups" and the requirement that there must be an intent to destroy the groups actually named in the convention "as such", render the convention meaningless. Soviet

Russia and its cohorts could readily approve it. This almost hopeless weakness of the convention has also been pointed out in an able article appearing in the Congressional Record for July 6, 1949, page A4510.

Why should the United States, under these circumstances, become a party to this convention with the difficult and serious problems which it raises for us, if the instrument is not effective to combat genocide where it presently occurs or is likely to occur?

It is to be deeply regretted that the United States did not hold to the position with which its representatives started to negotiate the Genocide Convention, namely, that the crime of genocide, properly defined, is inherently one committed by, or at the instigation of, or with the complicity or acquiescence of governments, and that otherwise it cannot effectively exist because it would otherwise be dealt with at home as a domestic crime only. But this concept was completely departed from and the approach of the convention, as now submitted, is that of individual crime and not of persecutions instigated or aided by governments.

Much of the comment being currently made in support of the Genocide Convention is based on the inadvertent and honestly mistaken assumption that as drawn it prevents "systematic homicide or the deliberate destruction of whole human groups for national, racial or religious purposes, by conquerors and dictators". (New York Times editorial, January 22, 1950.) This is far from the case in the draft as submitted.

The basic difficulty with the attitude of some people appears to be that because "prevention of genocide" and "protection of human rights" seem to be fine ideas with which nobody disagrees, therefore the United States should approve treaties relating to these subjects without taking a searching look at the text and pointing out its faults and its inappropriateness to the American scheme of constitutional government. True, this document was prepared with participation of American representatives at the United Nations, including persons from the State Department, but our representatives were outvoted on what they deemed to be basic principles, including also their continued opposition to the

insertion of "incitement to commit genocide" which our delegation pointed out was a plain infringement of freedom of speech and freedom of the press. The point sought to be made yesterday by some spokesmen, that the Peace and Law Committee of the American Bar Association was drawing a red herring on the free speech question, was made in ignorance of the record, which shows that the United States representatives vigorously urged the elimination of "incitement" as a violation of free speech. In the Report of the Sixth Committee, page 3, with reference to the 85th meeting, the following appears:

"With respect to article IV of the draft Convention, which listed the different acts to be punished, prolonged debates took place, particularly on the question of the retention or suppression of sub-paragraph (c) providing that 'direct incitement in public or in private to commit genocide shall be punishable whether such incitement be successful or not'. At its 85th meeting, the Committee rejected, by 27 votes to 16, with 3 abstentions, an amendment submitted by the representatives of the United States of America (A/C. 6/214) to delete this subparagraph".

Incidentally, we thought our State Department was right in this position, and our Committee said so in its report.

The leader of the American delegation also said at the 74th meeting of the Sixth Committee (*Ibid*), "The United States Delegation intended, at a later stage, to show the need for the establishment of an appropriate international tribunal." Thus an international tribunal with jurisdiction to try American citizens for acts of genocide (according to the definition contained in the convention, which goes far beyond mass murder) is in contemplation and under actual consideration, without any assurance that they will be surrounded by the constitutional safeguards and legal rights accorded persons charged with domestic crimes. Is it any wonder that many serious American students object to an international court for genocide at this stage of world history, and urge that we do not take the first step of ratifying this convention, as submitted, unless we are prepared to take the second step of approving an international court for trial of American citizens. As shown by the discussions in the Sixth Committee, the reference to an international panel tribunal was deliberately made in Article VI

of the Genocide Convention to put the world on notice that it was being planned.

On the other hand, the real purpose of an effective genocide convention must, and should, be to protect groups against the brutal excesses of their own governments. If this convention is to be enforceable only in domestic courts, as was so vigorously argued in support of it yesterday by Judge Patterson and others, what good would that have done the Jews under Hitler? What good will it do behind the Iron Curtain? How will it prevent genocide where it now goes on? That provision, with the further omission of "political groups" and the inclusion of "as such", render this treaty a complete delusion.

As pointed out above, our representatives now are, in drafts of later proposed treaties, putting forward the so-called "federal-state clause" in an effort to keep our constitutional system in balance, but it was not included in the Genocide Convention.

And the ultimate objective of the proponents of the Genocide Convention is to submit American citizens to trial by an international court on account of having, for example, inflicted "mental harm" on a "national, ethnical, racial or religious group". (See Article VI and II of the Genocide Pact.) The fact is that the people who wrote the Genocide Convention were not content with dealing with the evil that everyone deploras, namely, the group massacres engaged in by Hitler and other historical assassins, but saw fit to write into the Genocide Convention "civil rights" ideas, such as inflicting "mental harm" on a group "in whole or in part".

What is meant by inflicting "mental harm" on part of a group, which may mean a single person? Also, what about a lynching or a race riot? *The State Department's letter of transmittal recognizes that genocide may be committed against a single individual.* If, for example, in a town in the United States of America, where a crime had been allegedly committed by some unidentified Chinese, I should decide to get rid of all, or most of, the Chinese in the town by force, and should, in the process, kill or maim one of them, I would be guilty of genocide, in that, with intent to destroy part of a racial group, I had killed or maimed one individual.

The Chinese could well be a colored person, or member of any minority group.

Let us not delude ourselves that genocide as defined in this convention, which omits the essential element "with the complicity of government", could not happen here.

As forecasting what we may be accused of if the Genocide Convention is ratified by us, attention is called to the formal complaint that was filed with the United Nations by a group of Europeans against our trial of the eleven Communists in New York, as being a violation of the Declaration of Human Rights approved in Paris in 1948. This complaint was filed with the United Nations by a deputation from the International Association of Democratic Lawyers of which no Americans are members, but of which Mr. René Cassin, of France, is President, and Professor Cassin was and is a prominent member of the United Nations Commission on Human Rights, of which Mrs. Eleanor Roosevelt is Chairman.

While some attempt has been made to defend the "mental harm" phrase on the ground that it is said to have originated with a Chinese statement that the Japanese deliberately plied subject peoples with narcotics and thus damaged their brains or "minds", this state of facts would seem rationally included in causing "bodily harm", in consequence of which the words "causing serious bodily or mental harm to members of the group" must be deemed to have been used with their usual and ordinary meaning. Certainly, if "mental harm" in its ordinary and commonly accepted meaning was not deliberately intended, a much better word, or none at all, could have been chosen to cover that specific state of facts, because "bodily harm" was already covered. It cannot be assumed that the unambiguous words chosen, viz., "bodily or mental harm", will be construed by any court except in their usual sense, even if some other hidden and unusual meaning may have in fact been intended. The words "bodily harm" and "mental harm" or "mental suffering" or "mental anguish" have well-defined legal meanings. Let us bear in mind that this convention, as submitted, will be construed under Article IX by the World Court.

The undersigned has had the interesting experience of talking to numerous people who think that the idea of a Genocide Convention, for example, is fine, and wonder why anybody should object, until he asks them: "Have you ever read it?", to which they consistently answer, "No."

The American Bar Association in an official resolution last September at St. Louis, of which you have a copy, disapproved the Genocide Convention as submitted.

I think that the lawyers knew that their resolution in the Convention at St. Louis last September would not be popular with persons who like high-sounding phrases and ideas, but who never have examined the text; they were so told by Mr. Perlman and others; but, at the risk of taking what may be, to some, an unpopular action, the lawyers, acting through their national body in an official resolution, of which Congress and your Committee have copies, felt that they had a duty to tell the American public and the United States Senate that the Genocide Pact, as submitted, should not be ratified.

A part of the background for the official resolution of the American Bar Association is the Report of that Association's Special Committee on Peace and Law Through United Nations, dated September 1, 1949, which has been put into the record. That report recommended "that the Genocide Convention as submitted shall not be ratified by the United States", and fully covers the numerous objections to the convention, some not here mentioned, and the reasons for the recommendations. It is not the purpose of this statement merely to repeat that report, but to highlight certain points and to make some additional comments. With that report before it as part of the background, the American Bar Association officially resolved, on September 8, 1949, "that the Convention on Genocide now before the United States Senate be not approved as submitted".

And now a few comments on some of the statements made yesterday.

I felt sure that Dean Rusk of the State Department must have misspoken when he said that the intent must exist to destroy the *whole* group, even if only a part of the group was proceeded against. This statement, unless inadvertent, is of course contrary to the text which reads, "with intent to destroy, in whole or in part" a group, so that intent to destroy part of a group is genocide. As pointed out in the State Department's own letter of transmittal, this might be one person. It would also be contrary to the historical development of the convention, which came out of the Ad Hoc Committee in a draft requiring intent to destroy a whole group. The "in part" was inserted in the Sixth Committee on the recommendation of Norway.

He also stated that as genocide is defined, the Convention has no application to the United States, and that genocide has never occurred here. That gets us down to the definition—the omission of "with the complicity of government", the meaning of "in part", "mental harm", etc.—which, as submitted, will not be finally construed by us but by the World Court, under Article IX, which has jurisdiction over interpretation, application and fulfillment. I have pointed out that it would be entirely reasonable to include race riots under the present definition, and also lynching, if engaged in with intent to destroy part of a group.

Dean Rusk conceded that the Convention does not cover all groups, and the named ones only "as such". With "political groups" excluded, of course, Russia and others will have no problem in ratification.

He stated that while as a criminal law the treaty is not self-executing, we are committed to pass appropriate legislation, including penalties. He did not comment on the civil liability of individuals in damages undoubtedly created by the treaty even without provision of criminal penalties; in other words, as to civil liability, the treaty is self-executing. See the reservation of understanding proposed by the State Department.

As for Mr. Perlman, many of his legal observations on treaty law we concur in; they are elementary. However, I disagree with his answers to the hypothetical questions that were put concerning

Protestants and Catholics or driving the Chinese or some of them out of Chinatown with guns. That, in my interpretation, is genocide. I have checked this view with other informed persons here who are not members of my Committee. They agree with me, and disagree with Mr. Perlman. Mr. Perlman ignores the "in part" in the definition. I also believe that forceful action against part of a colored group, with intent to destroy part of the group, would be genocide. And please remember, neither Mr. Perlman's nor my construction would be controlling, but that of the International Court of Justice.

As for Judge Patterson, the distinguished ex-Secretary of War, I say, with all deference, that he obviously had not read the record of the Ad Hoc Committee and the Sixth Committee of the United Nations. If he had, he would not have made some of the observations he did, as for example, his argument about the free speech point, in which he undertook somewhat to disparage what he thought was our position. As pointed out before, our Committee was merely supporting the official position of the State Department in the Sixth Committee, on which it was outvoted. Our State Department members felt that inclusion of "incitement to genocide" might prevent ratification by the United States. And we think the State Department was right and Judge Patterson was wrong, as judges sometimes are.

Judge Patterson also glosses over the "in part", apparently not having read the record as to how the phrase got into the convention.

Judge Patterson also claimed that there was no individual obligation, until a federal law is passed, to provide criminal penalties. He overlooks completely the field of individual civil liability which arises on the face of the treaty without implementation. As drawn, our courts would be open to anyone who wants to sue another for damages for a genocidal act, as defined. And the final meaning and application of the Convention is for the International Court under Article IX. The State Department recognizes this civil liability. See its proposed reservation in the letter of transmittal. Also, Judge Patterson admits in the next breath that we are *obligated*, if we ratify, to pass such legislation, when even on his theory individual liability will arise.

In making the argument that no reservations are needed, Judge Patterson, as previously pointed out, has even the American Bar Association's Section of International Law against him, whose report Mr. Perlman so vigorously supported in St. Louis last fall. Judge Patterson advocates taking care of the many proposed reservations through implementing legislation by Congress. This, of course, overlooks that any matters relating to the interpretation, application or fulfillment of the Genocide Convention are subject to final decision by the Court of International Justice under Article IX of the Convention; and that any interpretations and understandings that Congress might include in implementing legislation, if not in accord with such final interpretation, would constitute a breach of the treaty—a non-fulfillment of its provisions. The only legally safe way of avoiding such a breach would be by reservations, as shown by the International Law Section's report. It has been the view of the Peace and Law Committee that the Convention is so dangerously drawn from the United States' standpoint, while at the same time not effective to prevent real genocide where it now goes on, that, as submitted, it should not be ratified. The American Bar Association, speaking officially through its House of Delegates, has "resolved that the Convention on Genocide now before the United States Senate be not approved as submitted".

Well, enough of these comments. I must let my associates take over. Our desire is not to obstruct but, on our own time as citizens and lawyers, to aid you in arriving at an informed judgment with respect to this Convention. I appreciate your courtesy and thank you very much.

(Statement made on January 24, 1950, quoted in Genocide Convention, hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 92-1, March 10, 1971, pp. 65-81.)

THE GENOCIDE CONVENTION--WHY THE SENATE SHOULD
REFUSE TO RATIFY IT
By Senator Sam J. Ervin

It would be extremely unwise for the Senate of the United States to ratify the Genocide Convention. This is particularly true at a time when it is manifest that a substantial part of the American people wish to contract rather than expand their international obligations.

HISTORY OF THE GENOCIDE CONVENTION

During the 1940's activists connected with the United Nations engaged in a strenuous effort to establish by treaties laws to supersede domestic laws of nations throughout the earth. The Genocide Convention represents one of these efforts. It originated in a resolution of the United Nations condemning genocide as a crime whether "committed on religious, racial, political, or any other grounds." When reduced to its final form it excluded genocide committed on "political" grounds because some of the parties to it did not wish to surrender even

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nominaly their right to exterminate political groups hostile to their rulers. Under its provisions, individuals as well as persons exercising governmental power would be subject to trial and punishment for offenses which have always been regarded as matters falling within the domestic jurisdiction of the various nations.

The Genocide Convention was adopted by the General Assembly of the United Nations on December 10, 1948, and was submitted by President Harry S. Truman to the Senate for its consideration on June 10, 1949. The Senate Foreign Relations Committee appointed a subcommittee composed of very able Senators, who conducted hearings in January and February, 1950, and reported to the full committee that the United States should not ratify the convention in any event unless the Senate adopted four substantial understandings and one substantial declaration. Since this report was made, the Senate Foreign Relations Committee and the Senate itself by inaction have refused to ratify this convention.

In contrast to the attitude represented by this inaction during the preceding 20 years, the Senate Foreign Relations Committee has apparently revived the question of ratification during the past few months notwithstanding the fact that there has been no change of circumstances which would make what was unwise in 1950 wise in 1970.

The only argument now advanced for ratification of this convention is that it would improve the image of the United States in the eyes of Russia and other totalitarian parties to the convention, which strange to say have repudiated by understanding and reservations many of the provisions of the convention. ...

For example, these nations refuse to be bound by article IX which subjects their actions under it to the jurisdiction of the International Court of Justice. Some of the proponents of ratification by the Senate advance the rather strange argument that the United States can safely ratify the convention because there is no effective way to enforce its provisions against the United States if the United States refuses to abide by them. I cannot buy this argument because I think that any nation which makes a contract in the form of a treaty should accept its obligations even in the event such obligations prove to be contrary to its own interest. Otherwise, why make treaties.

Before discussing the obligations which the United States would assume as the result of Senate ratification of the Genocide Convention, I wish to call attention to its salient provisions.

PROVISIONS OF THE GENOCIDE CONVENTION

By the Genocide Convention or treaty the contracting parties affirm in article I "that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

Articles II and III of the convention reads:

"Article II

"In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- "(a) Killing members of the group;
- "(b) Causing serious bodily or mental harm to members of the group;
- "(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- "(d) Imposing measures intended to prevent births within the group;
- "(e) Forcibly transferring children of the group to another group.

"Article III

"The following acts shall be punishable:

- "(a) Genocide;
- "(b) Conspiracy to commit genocide;
- "(c) Direct and public incitement to commit genocide;
- "(d) Attempt to commit genocide;
- "(e) Complicity in genocide."

Article IV specifies that "persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

Article V obligates the contracting parties to enact the necessary legislation to give effect to the provisions of the convention and to provide effective penalties "for persons guilty of genocide or of any of the other acts enumerated in article III."

Article VI provides that "persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the nation in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

Article VII provides that the parties to the treaty pledge themselves in genocide cases to grant extradition in accordance with their laws and treaties. Article VIII provides that "any contracting party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

Article IX provides that "disputes between the Contracting Parties relating to the interpretation, application, or fulfillment of the present Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

This brings me to the considerations which ought to deter the Senate from ratifying the Genocide Convention. Time and space compel me to limit my statement to only the most substantial of them.

CONVENTION DISTORTS CONCEPT OF GENOCIDE

First, if the Senate should ratify the Genocide Convention, the United States would be obligated by it to prosecute and punish public officials and private citizens of our country for acts alien to the concept embodied in the term genocide.

The definition of genocide appears in article II which states that the term genocide embraces five specified acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The convention definition of genocide is inconsistent with the real meaning of the term, which is "the systematic, planned annihilation of a racial, political, or cultural group." The word annihilation clearly contemplates the complete destruction or the complete wiping out of the designated group.

Yet, the convention definition covers the destruction either in whole or in part of members of a group embraced by it. This means that a public official or a private individual is to be subject to prosecution and punishment for genocide if he intentionally destroys a single member of one of the specified groups.

When it considered this convention in 1950, the subcommittee of the Committee on Foreign Relations took note of the fact that the convention distorts and perverts the entire concept embraced in the word "genocide," and for that reason stated that the Senate ought not to consider ratification of the convention unless it announced its understanding of its meaning:

"That the United States Government understands and construes the crime of genocide, which it undertakes to punish in accordance with this convention, to mean the commission of any of the acts enumerated in article II of the convention, with the intent to destroy an entire national, ethnical, racial, or religious group within the territory of the United States, in such manner as to effect a substantial portion of the group concerned."

This distortion and perversion of the plain concept embraced in the word "genocide" represents an effort on the part of the drafters of the convention to make punishable either in the courts of an adherent to the treaty or in an international tribunal to be established under the terms of the treaty, all of the acts enumerated in articles II and III of the convention.

Since an intent to destroy a single person belonging to one of the four designated groups would subject an official or individual to punishment, the treaty would make virtually every person in any nation adhering to it a potential victim of genocide as the meaning of that term is distorted and perverted by the convention. This is true simply because virtually every person on earth belongs to one or more of the four groups designated.

This observation is made exceedingly plain by the fact that an ethnical group is a "social group within a cultural and social system that claims or is accorded special status on the basis of complex, often variable traits including religious, linguistic, ancestral, or physical characteristics."

DRASTIC IMPACT OF CONVENTION ON OUR SYSTEM OF GOVERNMENT

Second, Article II, section 2 of the Constitution provides that "the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Article VI of the Constitution provides that "The Constitution and the laws of the United States, which shall be made in pursuance hereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

If the Senate should ratify the Genocide Convention, these constitutional provisions would automatically make the Convention the law of the land, put all of its self-executing provisions into immediate effect as such, and impose upon the United States the obligation to take whatever steps are necessary to make its non-self-executing provisions effective. This means that the provisions of the Genocide Convention would immediately supersede all State laws and practices inconsistent with them, and would nullify all provisions of all acts of Congress and prior treaties of the United States inconsistent with them.

While Congress could repeal provisions of the Genocide Convention by future legislation, the States would be bound by them as long as the Convention remained in effect. Moreover, the Genocide Convention would immediately require and authorize Congress to enact legislation implementing its provisions even though such legislation were beyond the power of Congress in the absence of the Convention, and even though such legislation would deprive the States of the power to prosecute and punish in their courts acts condemned by articles II and III of the Convention.

Surely, the Senate should pause and ponder what the impact of the ratification of the Genocide Convention would have on our system of government...

It is noted that virtually all the other nations of the earth have no constitutional or legal principle similar to article VI of the Constitution of the United States making treaties "the supreme law of the land," and that for this reason treaties do not take effect as internal law in other nations unless their legislative branches of government adopt laws subsequent to their ratification giving them such effect.

Third, One of the most drastic impacts the ratification of the Genocide Convention would have upon our system of government is in the criminal field. If the Senate should ratify the Genocide Convention, the duty and the power to prosecute and punish criminal homicides, assaults and batteries, and kidnappings, covered by categories (a), (b) and (c) of article II of the convention would be forthwith transferred from the states which have always had such duty and power in respect to these crimes to the Federal Government. To make this transfer of jurisdiction workable, Congress would be required to enact new laws laying down rules of procedure to govern the trial of these newly created Federal and international crimes. Pending the passage of such laws, our country would experience utter confusion in the administration of criminal justice in respect to homicides, assaults and batteries, and kidnappings.

Proponents of ratification may argue that many homicides, assaults and batteries, and kidnappings would not fall within the definition of genocide. This contention accentuates rather than minimizes the folly of ratifying the Genocide Convention.

As has been pointed out, virtually every person in America falls within one or more of the four groups designated in the Genocide Convention, and any offense denounced by the Genocide Convention against any one of them would ostensibly fall within the scope of the convention. The jurisdiction of the Federal courts under the Genocide Convention would not depend upon what the jury found in particular cases. It would depend upon the allegations made in the indictments or informations charging the offenses.

Consequently, we can reasonably expect that demands will be made that every homicide, every assault and battery inflicting serious injury, and every kidnapping shall be tried in a Federal court, or in an international court to be established pursuant to the convention. What this will do to increase the congestion in the already overburdened Federal courts of our land beggars description.

In the absence of ratification of the convention, demands have already been made that the United Nations investigate the slaying of Black Panthers by police officers on the ground that their slaying constituted genocide under article II(a), and that the United Nations investigate the action of the legislature of

one State in respect to welfare benefits on the ground that the legislative action constituted genocide under article II(c).

I respectfully suggest that the Senate should pause and ponder whether it is desirable to ratify a convention which would necessitate a fundamental alteration in the way in which criminal justice has been administered in the United States ever since our country came into existence as a free republic.

When the subcommittee on the Senate Foreign Relations Committee considered the Genocide Convention in 1950, it clearly recognized that ratification of the convention would play havoc with our system of administering criminal justice in respect to domestic crimes made Federal and international crimes by articles II and III, and for this reason decided that the Senate should not ratify the convention in any event without making this declaration:

"In giving its advice and consent to the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, the Senate of the United States of America does so considering this to be an exercise of the authority of the Federal Government to define and punish offenses against the law of nations, expressly conferred by article I, section 8, clause 10 of the United States Constitution, and consequently, the traditional jurisdiction of the several States of the Union with regard to crime is in no way abridged."

Confusion in the administration of criminal justice in respect to domestic crimes made Federal or international crimes by the Genocide Convention would not disappear with the enactment of legislation by Congress implementing the convention. The validity of this observation may be illustrated by taking a single crime, that of unlawful homicide. Under the Constitution of the United States, Congress does not have the power to make unlawful homicides generally Federal or international crimes. If ratified by the Senate, the Genocide Convention would give Congress this power in respect to homicides constituting genocide under the definition contained in the convention. Jurisdiction to prosecute and punish other unlawful homicides would remain in the State.

The only distinction between unlawful homicides remaining in the jurisdiction of the States and unlawful homicides transferred by the Genocide Convention and Acts of Congress implementing it to the Federal Government would depend upon whether the homicide is committed with genocidal intent. As a consequence, every unlawful homicide would apparently be within the jurisdiction of both the Federal and the State government insofar as the external circumstances of the slaying are concerned.

Hence, either State or Federal courts could assert jurisdiction in respect to virtually all homicides, and an acquittal of the charge in one court would not bar a second prosecution based on the same facts in the other court. This being true, a person could be twice placed in jeopardy for the same offense.

The power of a Federal court to try a person for a homicide on the ground that it constitutes genocide depends upon the allegations of the indictment and not upon the ultimate finding of the jury. On a trial in the Federal court, the jury would be compelled to acquit the accused of genocide unless it found that he acted with the requisite genocidal intent, no matter how atrocious the circumstances attending the homicide otherwise might be. In such a case, the accused would go unwhipped of justice unless he was placed upon trial a second time in a State court.

The Senate should be slow to ratify any convention which would make such confusion in the administration of criminal justice in cases of this kind.

MEANING OF CONVENTION SHROUDED IN UNCERTAINTY

Fourth. If the Senate should ratify the Genocide Convention, it would place obligations upon the United States to prosecute and punish as genocides acts whose nature the convention fails to disclose and to take steps whose nature the convention fails to reveal.

If the convention is ratified, article II(b) would impose upon the United States the duty to prevent and to prosecute and punish public officials and individuals who cause "mental harm to members" of any one of the four groups named in the convention. What "mental harm" means in this context is totally incomprehensible, and what psychological acts or omissions are made punishable in this context are left in obscurity. When the Subcommittee of the Senate Foreign Relations Committee considered the Genocide Convention in 1950, it reached the conclusion that the Senate ought not to ratify the Genocide Convention in any event unless it expressed this understanding:

"That the United States Government understands and construes the words 'mental harm' appearing in article II of this Convention to mean permanent physical injury to mental faculties."

If the convention is ratified, article II(c) would impose upon the United States the duty to prevent and to prosecute and punish anyone who deliberately inflicts "on the group conditions of life calculated to bring about its physical destruction in whole or in part." What this means, no mind can fathom. Does it mean that a State or county official who refuses to give to a member of one of the four groups designated in the convention the amount of welfare benefits deemed desirable is to be punished or prosecuted for genocide? Does it mean that the Court of International Justice shall have power under article IX to adjudge that Congress or a State legislature which does not make available to members of one of the four groups what the Court deems to be adequate welfare benefits has violated the convention?

If the convention is ratified, article III(c) makes any official or individual in our land punishable for "direct and public incitement to commit genocide." What does this mean? Does it mean that the convention undertakes to make a Senator or a Congressman punishable for genocide if he makes a speech outside of the Chamber of his respective House in which he justifies the action of Arabs in killing Jews, or the action of Jews killing Arabs? Does it undertake to deprive public officials and citizens of America of the right to freedom of speech with respect to matters falling within the terms of the Genocide Convention?

If anyone believes that the first amendment invalidates my apprehension on this score, let him read and ponder *For v. Washington*, 236 U.S. 273, and *Feiner v. New York*, 340 U.S. 315, as well as the majority and dissenting opinions in *Terminiello v. Chicago*, 337 U.S. 1.

If the convention is ratified, public officials and private citizens of our land will be subject to punishment in Federal courts or possibly in international penal tribunals to be established under article VI if they are guilty of the undefined offense designated as "complicity in genocide." What is "complicity in genocide?" The convention does not say.

When the subcommittee of the Senate Foreign Relations Committee considered the Convention in 1950, it recognized the vagueness and uncertainty of this proposed Federal and international crime, and recommended that the Senate should not ratify this Convention in any event without stating the following reservation:

"That the United States Government understands and construes the words 'complicity in genocide' appearing in article II of this Convention to mean participation before and after the fact and aiding and abetting in the commission of the crime of genocide."

If the convention is ratified, article II would impose upon the United States the obligation to prevent and to punish as a crime under international law any act of genocide "whether committed in time of peace or in time of war," and article VIII would authorize any party to the convention to call on the United Nations to take such action against the United States under the charter of the United Nations it considers "appropriate for the prevention and suppression of acts of genocide, or any of the other acts enumerated in article III" occurring or likely to occur anywhere in the United States.

What actual obligation does article I impose upon the United States with respect to events occurring either in peace or in war in lands beyond the seas? Does it require the United States to go to war to prevent one nation from killing the nationals of another nation? The Convention does not say, but article IX places the power to determine this question in the International Courts of Justice.

Does article VIII imply that the United States agrees that the United Nations is to investigate or take action concerning the acts of public officials and individuals occurring within the borders of the United States? The convention does not say, but article IX leaves this determination to the International Court of Justice.

Able lawyers have expressed the fear that article VI imposes upon the Congress an implied commitment to support the creation of an international court for trials of American citizens for genocide. I find myself in complete harmony with their opposition to subjecting our citizens and other persons within our territorial jurisdiction to trial, conviction, and sentence for acts of genocide committed in the United States by an international penal tribunal where they would not be surrounded by the constitutional safeguards and legal rights accorded persons charged with a domestic crime.

CONVENTION MAKES SOLDIERS PUNISHABLE FOR SERVING THEIR COUNTRY IN COMBAT

Fifth. If the Senate should ratify the Genocide Convention, it would make American soldiers fighting under the flag of their country in foreign lands triable and punishable in foreign courts—even in courts of our warring enemy—for killing and seriously wounding members of the military forces of our warring enemy.

This is made indisputable by article I which provides that genocide is punishable under the convention whether it is committed in time of peace or in time of war, and by the fact that it contains no provision exempting soldiers engaged in combat from the coverage of the provisions of the convention. When soldiers kill or seriously wound members of a detachment of the military forces of a hostile nation, they certainly do so with intent to destroy, in whole or in part, a national group as such. Hence, their acts in combat fall clearly within the purview of the convention. In such cases, they are triable and punishable under article VI in the courts of the nation in whose territory their acts are committed, or in such an international penal tribunal "as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

These things being true, American soldiers killing or seriously wounding North Vietnamese soldiers or members of the Vietcong, or South Vietnamese civilians in South Vietnam, are triable and punishable in courts sitting in South Vietnam, and American aviators who kill North Vietnamese soldiers or civilians in bombing raids upon targets in North Vietnam, and who fall into the hands of the North Vietnamese, are triable and punishable in the courts of North Vietnam. No sophistry can erase this obvious interpretation of the Genocide Convention.

CONVENTION SUBORDINATES THE AMERICAN GOVERNMENT TO THE WORLD COURT

Sixth. If the Senate should ratify the Genocide Convention, article I would impose upon the President, as the Chief Executive of the United States, the duty to enforce both the provisions of the convention and any acts of Congress implementing them as the supreme law of the land.

Article V would obligate the Congress to enact legislation to give effect to all the provisions of the convention, and to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III, and article VI would obligate the Supreme Court of the United States and all inferior Federal courts created by Congress to interpret and apply all of the provisions of the convention and of the acts of Congress implementing it to cases coming before them under the terms of the convention and the acts of Congress implementing such terms.

Seventh. If the Senate should ratify the Genocide Convention, it would bring into play article IX which provides that disputes between the parties to the convention relating to the "interpretation, application, or fulfillment" of the convention "shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Under this article the International Court of Justice would be empowered to decree that the President of the United States, as Chief Executive Officer of the United States, had interpreted and applied the provisions of the convention incorrectly, and by so doing impose upon the President of the United States its notions as to how the convention should be interpreted and enforced; the power to adjudicate that legislation enacted by Congress to give effect to the provisions of the convention was insufficient to fulfill the obligations imposed upon it by the convention; and the power to adjudicate that the Supreme Court of the United States and Federal courts inferior to it had interpreted and applied the provisions of the convention incorrectly and by so doing require these tribunals to apply its notions as to how such provisions should be interpreted and applied to future cases coming before them.

When their attention is called to the drastic powers which the ratification of the Genocide Convention would bestow upon the International Court of Justice in respect to the President, the Congress, and the Supreme Court and other inferior Federal courts, the proponents of ratification assert that these agencies of the Government of the United States do not have to obey the rulings of the International Court of Justice if they deem that such rulings infringe upon the fundamental sovereignty of the United States. In so doing they ignore the solemn obligation assumed by the United States under article 91 of the charter of the United Nations which reads as follows:

"Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

The charter of the United Nations clearly contemplates that the United Nations will not interfere in the domestic affairs of any nation. The Genocide Convention goes a bow shot beyond the charter of the United Nations. It undertakes to regulate certain domestic affairs of the parties to it by converting what have always been domestic crimes into international crimes, and confers upon the International Court of Justice the vast powers set forth in article IX.

Consequently, if the Senate should ratify it, the Genocide Convention would render the Connally reservation, which was designed to prevent the International Court of Justice from exercising jurisdiction over any domestic affair of the United States, inapplicable to any of the matters covered by the convention, and would nullify the Vandenberg reservation to the jurisdiction of the International Court of Justice which stipulates that American acceptance of compulsory jurisdiction of the Court shall not apply to "disputes arising under a multilateral treaty, unless all parties to the treaty affected by the decision are also parties to the case before the Court, or the United States specially agrees to jurisdiction."

What I have said does not militate against the good intentions of those who drafted the Genocide Convention, or those who favor its ratification. All of us are opposed to the systematic, planned annihilation of any national, ethnical, racial, or religious group. The existing laws of the United States and its several States are adequate to punish all of the physical acts of violence denounced by the Genocide Convention. Hence the Senate does not need to ratify the Genocide Convention in order to make these acts punishable as crimes if committed within the borders of our land.

But the Senate should not permit itself to be persuaded by the good intentions of the proponents of ratification to ratify a convention which would have such a tragic impact upon the system of government which has always existed in our land, and which for the first time in our history undertakes to make undefined psychological harms inflicted in some undefined manner Federal and international crimes.

The American Bar Association has twice urged the Senate to reject the Genocide Convention—once in 1949 and again in 1970.

In closing, I urge every Senator to read the booklet entitled "The Convention on the Prevention and Punishment of the Crime of Genocide" prepared by 30 of the most distinguished and patriotic lawyers of America.

(Statement made on May 22, 1970, quoted in Genocide Convention, hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 92-1, March 10, 1971, pp. 1-8.)

Pitfalls of the Genocide Convention

by Orie L. Phillips and Eberhard P. Deutsch

Everyone is against genocide, but the ratification of the Genocide Convention by the United States would raise thorny and serious questions and might subject our citizens to trials in which our constitutional safeguards are not observed. Concurrence in the lofty ideals that engender the promotion of moral issues should not substitute the ephemeral tissue of those ideals for the enduring fiber of constitutional limitations.

ON SEPTEMBER 8, 1949, the American Bar Association, through its House of Delegates, expressed the sense of the Association "that the conscience of America like that of the civilized world revolts against Genocide . . . ; that such acts are contrary to the moral law and are abhorrent to all who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnical, racial, religious or political groups to which they belong; [and] that Genocide as thus understood should have the constant opposition of the government of the United States and of all its people".

The House nevertheless placed the Association of record as opposing approval by the Senate of the United States of the Convention on the Prevention and Punishment of the Crime of Genocide "as submitted" to the Senate for its advice and consent by President Truman less than three months earlier—on June 16.¹

At its Midyear Meeting in Atlanta on February 23 of this year, the House reaffirmed the position taken in 1949, voting down by a narrow margin a recommendation for approval of that

position and for unreserved approval of the convention.

The authors of this article are in complete accord with both the declaration of and the conclusion reached by the Association. This article is written as a record of the background of that position, which, in the last analysis, is simply that wholehearted concurrence in the lofty ideals that engender promotion of moral issues should not be permitted to substitute the ephemeral tissue of those ideals for the enduring fiber of constitutional limitations.

The Genocide Convention originated in the United Nations. On December 11, 1946, the General Assembly adopted a declaration to the effect that genocide "is contrary to moral law and to the spirit and aims of the United Nations"; that "many instances . . . of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part"; and that genocide is a crime, whether it "is committed on religious, racial, political or any other grounds" (emphasis supplied). The declaration invited "the Member States to enact the summary legislation for the prevention and punishment of this crime".

1. The word "genocide" was coined by the late Professor Raphael Lemkin (1896-1959) of the Yale Law School, whose parents were perished in Poland.

2. In 1950 the Senate Foreign Relations Committee, headed by Senator Connally of Texas, being before it the genocide treaty from President Truman for advice and consent, ordered hearings by a subcommittee under the chairmanship of Senator McMahon of Connecticut. Hearings were extensive, running over a number of days. Many persons appeared in support of ratification. Carl E. Rits of Milwaukee, a former President of the American Bar Association, the late George Finch of Washington, D. C., then and for many years Editor-in-Chief of the *American Journal of International Law* and professor of international law at Georgetown University, and Alfred J. Schweppe of Seattle, formerly Dean of the University of Washington Law School and at the time Chairman of the

American Bar Association's Committee on Peace and Law Through United Nations, opposed and testified against ratification, pointing out the grave inadequacies and risks of the proposed convention.

The testimony taken at the hearings is part of the Senate records. After three 1950 hearings, the proposed convention lay dormant for some twenty-one years, until revived by President Nixon in February, 1970.

It appears significant that Dean Finch, who as Assistant Secretary of State presided in State Department's position in the McMahon subcommittee in 1950, was Secretary of State for eight years under two recent Presidents, even with a heavy Democratic majority in the Senate. Equally significant is the fact that during the Eisenhower Administration John Foster Dulles, the Secretary of State, announced that the administration would get bring up the Genocide Convention.

Genocide Convention

The United States joined in this declaration. Standing foremost as a world leader in the protection of individual rights, she could do no less. The authors of this article are in complete and unequivocal accord with the following statement made by the American Bar Association's Section of Individual Rights and Responsibilities in its report on the Genocide Convention submitted to the House of Delegates in February of this year:

... The United States, which was founded on the basis of protest against government excesses, and which grew great in substantial measure because it was a haven and the hope for oppressed persons everywhere, should be in the lead in joining in the declaration of revulsion at the organized effort to eliminate a whole people during World War II, and of determination that such an effort should not be undertaken ever again.

But the conviction of the authors is equally firm that having joined in such a declaration as to a matter which lies ultimately within the domestic sphere of each of the world's nations, the United States has gone far enough. She should not, in our opinion, join in a convention by which she would commit herself in advance to protect the people of other nations against their own government. Nor should she agree that such other countries may determine what is to be deemed to be genocide within the borders of the United States and invite them in advance, in the words of Article VIII of the Genocide Convention, to take through "the competent organs of the United Nations, such action under the Charter of the United Nations as they consider appropriate" for the "suppression" thereof.

The Section report itself makes this point abundantly clear. It is stated therein that under Article VIII of the Genocide Convention:

... Even if the complaint involved alleged prohibited action by one country against an ethnic group within its own country... the claim that the United Nations could not consider the matter because it concerned the domestic jurisdiction of one state... would be foreclosed. The Security Council, or the General Assembly, or the Economic and Social Council would all be authorized to hear the complaint. In

appropriate cases, where the complaint was borne out by the facts, the United Nations organs could recommend or decide on measures to be taken. . . .

Treaties Should Not Be Used for Internal Government

It is submitted that treaties with other nations are not the proper constitutional means for the government of the people of the United States in their internal affairs, which should continue to be regulated by our own federal, state and local legislative bodies through enactments that have their foundation in our own constitutional processes.

We subscribe wholeheartedly to the statement made by John Foster Dulles as Secretary of State, testifying before a subcommittee of the Senate Judiciary Committee on a proposed constitutional amendment to limit the effect of treaties as internal law within the United States:

I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedure established in relation to what are essentially matters of domestic concern. [The United States should] favor methods of persuasion, education and example rather than formal undertakings. . . .

We do not ourselves look upon a treaty as the means which we would now select as the proper and most effective way to spread throughout the world the goals of human liberty in which this Nation has been dedicated since its inception.

The authors of this article do not agree with the extravagant statement in the Section report that "in terms of a threat to international peace and security, the occurrence of genocide anywhere in the world is as much a matter of international concern as, for example, the spread of nuclear weapons"; or that "when some states—or, as in this case, 74 states—consider a matter to be of sufficient concern to make a treaty about it, then realistically it is of international concern".

This is the old bootstrap doctrine by which a domestic issue, not subject to such to regulation by treaty, can be transmuted, by the very prohibited act of making it the subject of a treaty, into the arena of international affairs

subject to regulation by treaty. It is the same doctrine that gave rise to the 1950 dictum by the Department of State that "there is no longer any distinction between 'domestic' and 'foreign' affairs".³

If the limitations contained in the Constitution of the United States are subject to circumvention by this jurisdictional surgery, the matter becomes one of broad constitutional policy rather than of strict constitutional law. Our constitutional philosophy should not be so impaired by transplanting matters within our domestic jurisdiction into the international forum, subject to legislation by treaty and adjudication by international tribunals.

Genocide by Government Is Not in the Convention

There can really be no question, as stated in the Section report, that "the crimes which gave rise to the Genocide Convention—mass murder of Jews . . . by the Nazis was, of course, done with the encouragement and indeed at the direction of the government of Germany". It is the position of the authors of this article that in order for genocide to be an international crime, and therefore a matter of international concern, appropriately the subject of a treaty, it must, by definition, be committed with the complicity of the government concerned, not merely by individuals.

When the convention was being formulated, the representatives of the United States, backed by those of other Western nations, sought as a sine qua non to have genocide defined as having been committed "with the complicity of government", because its "delegation felt in fact that genocide could not be an international crime unless a government participated in its perpetration".⁴

3. State Department Publication 2972, Foreign Policy Issues No. 1 (1950).

4. See record of the proceedings of the Ad Hoc Committee in 1948, and especially the statement made on April 15, 1948, by Mr. Mahon of the United States, chairman of the committee, as to the position of the United States, and also the proceedings and votes in the Sixth (Legal) Committee (73rd and 128th meetings), and the Official Records of the Third Session of the General Assembly, Part I, "Legal Questions".

This demand was rejected, and under Article IV of the convention state-parties are required merely to enact legislation providing punishment for "persons committing genocide" and requiring the trial of "persons charged with genocide", whether they are "public officials or private individuals". Instead of including government complicity as an element of the offense, Article VIII of the convention permits "the competent organs of the United Nations" to interfere in the domestic affairs of member nations by hearing complaints as to the conduct of their individual citizens, and to "take such action . . . as they consider appropriate" against them.

The type of problem with which the United States might be faced in this regard, if it became a party to the Genocide Convention, is illustrated graphically and startlingly by a recent news item in *Time* of December 12, 1969, which reported that a "San Francisco lawyer who represents the [Black] Panthers . . . revealed plans to go before the United Nations and charge the United States with 'genocide' against the Panthers".

Vague Language Causes Problems

Another constitutional question of some significance arises from the vagueness of certain provisions of the convention. It provides in Article II, but instance, that genocide consists of certain "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" by "(b) causing serious . . . mental harm to members of the group".

There would seem to be grave doubt as to whether so vague a provision as that of "mental harm" could be cured by implementing legislation such as, for example, that proposed by the Section of Individual Rights and Responsibilities in an annex to its report on the convention, which refers to conduct "with the intent to destroy" and which "causes serious harm to the . . . mind". Even the February 19, 1970, message of the President to the Senate, with its attached letter from the Secre-

etary of State, requesting advice and consent to ratification, recommends that this be done with an "understanding" that the words "mental harm" be construed as having a clarifying narrow meaning.

Language so broad and vague, if not unconstitutional in legislation defining crime, could well have been held to characterize racial segregation practices prior to 1954 as genocide. In *Brown v. Board of Education*, 347 U.S. 483, the Supreme Court held expressly that separation of Negro children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . [and] has a tendency to [retard their] education and mental develop-

ment".

"Political" Groups Removed from the Convention

Just as the United States and her political allies were unable to get "complicity of government" into the definition of genocide, they also acquiesced at the insistence of the Communist bloc in the omission of "political" from the category of groups as to which genocide is to be prohibited.

The original United Nations declaration denounced genocide whether "committed on religious, racial, political or any other grounds" (emphasis added). When this declaration was being converted into the convention, the Communist nations insisted on omission of "political" from the listed categories, and the United States capitulated. None of the Communist nations, therefore, can be charged under the convention with committing genocide by inflicting intolerable "conditions

of life" on a political group and seeking to destroy its members.

When this point was raised in the House of Delegates last February, Nicholas de B. Katzenbach, a former Under Secretary of State of the United States, said, in effect, that omission of "political" from the convention was simply a "trade" in the course of compromise between the Communist and Western nations by which "we succeeded in getting 'ethnical' included among the groups in place of 'political'". Considering that "ethnical" in its ordinary meaning is defined as "pertaining to or designating races" and that "racial" already was in the draft of the convention, a compromise for the insertion of "ethnical" in return for the omission of "political" seems to have been a one-sided trade, with our side the loser.

The elimination of "political" groups and "with the complicity of government" now permits genocide where it goes on (Czechoslovakia, Hungary, Africa, Asia). Sir Hartley Shawcross, a former British Attorney General, said that the adoption of the convention will delude people into believing that a great step forward has been taken, whereas nothing has been accomplished.

This "legislative history" as to the circumstances under which "political" was omitted on the insistence of the Soviet Union and other Communist nations, so that assassination of political groups is not prohibited by the convention, is explained and confirmed by the refusal of the Soviet Union to ratify the 1957 Convention on the Abolition of Forced Labor, because it prohibits the imposition of forced labor as a means of political coercion or as punishment for the expression of political views opposed to those of the government.

Genocide Convention

Where Can Genocide Trials Be Held?

Aside from the answerability of governments for violation of the convention on charges filed with the United Nations, the treaty provides (Article VI) that "Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

In an article in the January, 1970, issue of this journal (page 71), Bruno V. Biker inadvertently omitted the words "in the territory of which the act was committed" when he quoted from Article VI. In a letter to the editor in the April issue (page 296), the omission was corrected by Mr. Biker, but his January article concludes that a United States citizen charged with genocide under no circumstances could be tried elsewhere than in a court of the United States.

And in the report of January, 1970, on the genocide convention submitted by the Standing Committee on World Order Under Law to the House of Delegates, the same egregious omission is drawn to the effect that since there is no such international tribunal as is contemplated under this article, no "American citizen could be deprived of his constitutional right to trial by jury, or be found into a trial in some foreign court under procedures not American."

It seems especially difficult to understand this fallacious syllogism in light of the provisions of Article VII of the convention that genocide is not to be considered a political crime and that the parties to the convention "pledge themselves in such cases to grant extradition", presumably for trial in "the State in the territory of which the act was committed" (Article VI), "in accordance with their laws and treaties in force".

These jurisdictional and "extraditional" provisions raise important practical problems for the United States. The authorities in Hanoi have

charged that members of the Armed Forces of the United States have been guilty of genocide in "the alleged massacre of civilians in a South Vietnamese village". If the United States were a party to the Genocide Convention, she would necessarily have agreed that those soldiers are subject to trial in Vietnam under the provisions of Article VI and, if the United States and Vietnam should ever have an extradition treaty, would be subject to extradition for trial in Vietnam, even if deemed or found innocent in this country.

Of course, no extradition would be necessary as to our American prisoners in North Vietnam. That country, it may be assumed, would cite the Genocide Convention, if we were a party to it, as our consent to the trial of those prisoners on genocide charges in that country, with the Nuremberg trials as a sanctioning precedent.

What Has Happened to the "Nuremberg Defense"?

This suggestion in turn raises another interesting, serious and dangerous question for the United States. The "Nuremberg defense", universally pleaded in war crimes trials, is that the accused was following orders he was required to obey. Article IV of the Genocide Convention provides: "Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." As stated in the report of the Section of Individual Rights and Responsibilities: "The Genocide Convention makes clear, in Article IV, that in respect of the crimes specified, no one, not governmental officials, not private individuals, can escape responsibility for his action through this [Nuremberg] defense."

We join in asking the rhetorical question posed in his dissent by Ben R. Miller, a member of the council of the Section:

Would not the military strength of this nation and hence the nation itself be endangered if in following orders of a superior officer in the heat of battle subordinates would be faced with

instant decision of whether to risk court martial for refusing to follow orders, or punishment for genocide if a [tribunal] in the calm aftermath of a war could consider the result of following a particular order to have been genocide? For the Treaty abolishes the defense of subordinates that they were but following orders of their superior officers.

International Penal Tribunal Standing in the Wings?

Oponents of the Genocide Convention have insisted that if the convention were ratified by the United States, there would be the possibility of the trial of an American citizen accused of genocide before an international penal tribunal when, as well as such a court should be established and its jurisdiction accepted by the United States. The trial would be without the constitutional safeguards by which he would be protected in a court of the United States.

To this the proponents of the convention said in the Section report that "the answer is simple. No such tribunal has been established." They added:

If one were established, parties to the Genocide Convention would have the option whether to accept its jurisdiction or not. For the United States, that option would have to be independently exercised through the Treaty Power, that is only with the advice and consent of the Senate by a two-thirds vote.

Issue is taken, in the first place, with the last-quoted statement. This is just the type of action that, like recognition of a new foreign government, might be accomplished by an executive agreement without the advice and consent of the Senate. The point is well illustrated by the recent case of the International Anti-Dumping Code, concluded by the United States with seventeen other nations in Geneva on June 10, 1967. All those countries treated the code as a formal treaty requiring parliamentary approval—and so ratified it. The United States alone dealt with the document as an executive agreement, and because certain of its provisions were in direct conflict with corresponding provisions of Congressional tariff acts, this code was not submitted to the Sen-

ate for its advice and consent for fear of adverse action by that body.⁵

There possibly would be no practical way in which to assert the invalidity of an executive agreement excepting, in behalf of the United States, the jurisdiction of an international penal tribunal established for the trial of offenders under the Genocide Convention, since that convention itself had been ratified by the United States.

Nor can it be said cavalierly that it is not contemplated by the United States that an international penal tribunal is to be established. The minutes of the 74th meeting of the Sixth (Legal) Committee of the General Assembly of the United Nations, held at Paris in October, 1948, contain a significant statement to the effect that the United States delegation stated that it "intended, at a later stage, to show the need for the establishment of an appropriate international tribunal" in connection with Article VI of the Genocide Convention.

George A. Finch, a former Deputy Under Secretary of State, professor of international law at Georgetown University, Vice President of the American Society of International Law and editor-in-chief of its journal, in an address before the annual meeting of the society at Washington on April 29, 1949, said: "The proposals . . . to prevent genocide . . . have been framed so as to take American domestic questions out of the jurisdiction of American courts and place them under some form of international jurisdiction."

In a book on international enforcement of human rights, Professor Paul Gormley of the University of Tulsa School of Law states: "A private individual must be able to prosecute an action before an international tribunal—in his own name—against an offending government, particularly his own."

The Bangkok Conference on World Peace Through Law, held in September, 1950, unanimously adopted a resolution commending its committee engaged in a project entitled "Toward a Possible International Criminal Court" and giving it all possible support and assistance.

How can it be said in good con-

science, in the face of this wealth of background material to the contrary, that Americans may rest assured that ratification of the Genocide Convention by the United States at this time will not carry with it the ultimate establishment of an international penal tribunal for the trial of citizens of the United States charged with commission of offenses thereunder?

An American citizen or any other person residing in the United States who is tried by an international tribunal created for the trial of persons charged with the offense of genocide would be deprived of many of the rights provided in our Constitution for persons charged with offenses against the laws of United States in our national courts. Among these are the right to be charged for a capital or infamous crime only on a presentment or indictment of a grand jury and the right to a speedy and public trial by an impartial jury of the state and district wherein the crime is alleged to have been committed. The privileges against self-incrimination and the protection against unreasonable searches and seizures also might disappear.

Another reason militating against ratification of the Genocide Convention arises from the provision of Article III(c) making punishable "direct and public incitement to commit genocide" vis-à-vis the First Amendment's guarantee of free speech and press. Suffice it to say here that there is at least grave doubt under recent decisions of the Supreme Court as to the effect to be given, even by that Court, to such a treaty provision in the circumstances of different cases—certainly completely incomprehensible to judges of an international tribunal to whom our concepts of freedom of thought and expression might be alchemical mysteries at best.

Reservations on Adherence Would Be Ineffective

It is extremely doubtful that objections to the ratification of the convention by the United States can be overcome by reservations attached to our adherence. It will be recalled that by the Connally Amendment to the reservation of the United States to its decla-

ration of adherence to the International Court of Justice, it is stipulated that the United States is not to be subjected to the provisions of that court as to disputes which are essentially within her own domestic jurisdiction "as determined by the United States of America".

To circumvent that reservational safeguard, it was provided by Article IX of the Genocide Convention:

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

This article clearly overrides the Connally Amendment and subjects the United States to the unreserved jurisdiction of the International Court of Justice as to all matters involving the "interpretation, application or fulfillment" of the convention. Thus, if our Supreme Court should hold that a case under the convention is within this country's domestic jurisdiction and the conduct protected by the First Amendment, any party to the treaty could take the matter before the International Court of Justice, which need not follow our Court's decisions. It might hold that the case was not within our domestic jurisdiction, and the United States would be bound by that decision despite the Connally Amendment.⁶ This is a constitutional consummation devoutly to be avoided.

How Effective Could the Genocide Convention Be?

In the final analysis, the prohibition of genocide by treaty must become an exercise in futility. Adolf Hitler would hardly have restrained the frightful acts of genocide that gave rise to the

5. See Public Law 80-624, 82 Stat. 1347 (October 24, 1968), 16 U.S.C.A. § 166, note (Suppl.), amending certain provisions of the code, and its legislative history in U.S. Congressional and Administrative News (1968), Vol. 5, 639 f. See also Long, *United States Law and the Anti-Dumping Code*, 5 Int'l. Lawyer 664 (1969).

6. See Phillips, *The Genocide Convention*, 33 A.B.A.J. 623, 625 (1949).

Genocide Convention

convention, even if it had been in existence and Germany had been a party to it during the Nazi reign of terror. The Soviet Union and her Communist-bloc allies were not deterred from the 1968 invasion of Czechoslovakia by the nonaggression provisions of the Charter of the United Nations.

The Genocide Convention places in

the hands of nations whose peoples have never known the freedoms guaranteed under our Constitution the power to judge whether those freedoms are being protected properly within our domestic borders.

It is submitted that an international convention whose provisions may be invoked in an international forum

when an individual commits a crime within the domestic jurisdiction of a state would cause far more friction between peoples and governments than does the evil it seeks to correct. It would tend to promote war rather than to maintain international peace and security within the letter and spirit of the Charter of the United Nations.

TREATIES SHOULD NOT BE USED TO ENACT
DOMESTIC LEGISLATION

By Eberhard P. Deutsch*

(Statement made in behalf of the American Bar Association)

On September 8, 1949, at its annual convention in St. Louis, the American Bar Association, through its House of Delegates, expressed the "sense of the Association that the conscience of America, like that of the (entire) civilized world, revolts against Genocide . . . ; that such acts are contrary to the moral law and are abhorrent to all who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnical, racial, religious or political groups to which they belong; (and) that Genocide as thus understood should have the constant opposi-

*Member of the New Orleans Bar

tion of the government of the United States and of all of its people".

The House found, however, "that the suppression and punishment of Genocide under an international convention to which it is proposed the United States shall be a party involves important constitutional questions (which) the proposed convention . . . does not resolve . . . in a manner consistent with our form of Government".

The House accordingly placed the Association of record as opposing approval, by the Senate of the United States, of the Convention on the Prevention and Punishment of the Crime of Genocide "as submitted" to it for its advice and consent by President Truman less than three months earlier - on June 16.

At its mid-winter meeting in Atlanta on February 23, 1970, the House, by the narrow margin of 130 to 126, re-affirmed the position which it had taken in 1949, by voting down a recommendation for reversal of that position and for unreserved approval of the Convention.

This statement is submitted in support of the position of the American Bar Association as recited above, and to record the background of that position which, in the last analysis, is simply that whole-hearted concurrence in the lofty ideals that engender

promotion of moral issues, should not be permitted to substitute the ephemeral tissue of those ideals for the enduring fiber of constitutional limitations.

On December 11, 1946, the General Assembly of the United Nations adopted a Declaration to the effect that genocide "is contrary to moral law and to the spirit and aims of the United Nations"; that many instances . . . of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part"; that genocide is a crime, whether it "is committed on religious, racial, political or any other grounds"; and inviting "the Member States to enact the necessary legislation for the prevention and punishment of this crime" (emphasis added).

The United States joined in this declaration. Standing foremost as a world leader in the protection of individual rights, she could do no less. Representing the American Bar Association, we are accordingly in complete and unequivocal accord with the following statement made by the Association's Section of Individual Rights and Responsibilities in its recent Report (p.7) recommending that the Association go on record as favoring ratification of the Genocide Convention:^{*}

^{*} Reference to that report will hereinafter sometimes be made as the "Section Report".

"The United States which was founded on the basis of protest against government excesses, and which grew great in substantial measure because it was a haven and the hope for oppressed persons everywhere, should be in the lead in joining in the declaration of revulsion at the organized effort to eliminate a whole people during World War II, and of determination that such an effort should not be undertaken ever again."

But our conviction is equally firm that, having joined in such a declaration as to a matter which lies, ultimately, within the domestic sphere of each of the world's nations, the United States has gone far enough.

She should not, in our opinion, join in a Convention by which she would commit herself in advance to protect the people of other nations against their own governments, nor agree that such other countries may determine for themselves what is to be deemed to be genocide within the borders of the United States, and invite them in advance, in the words of Article VIII of the Genocide Convention, to take, through "the competent organs of the United Nations, such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression thereof.

The Section Report itself makes this point abundantly,

and indeed shockingly, clear. It is stated therein (p.17) that under Article VIII of the Genocide Convention,

"Even if the complaint involved alleged prohibited action by one country against an ethnic group within its own country . . . the claim that the United Nations could not consider the matter because it concerned the domestic jurisdiction of one state . . . would be foreclosed. The Security Council, or the General Assembly, or the Economic and Social Council would all be authorized to hear the complaint. In appropriate cases, where the complaint was borne out by the facts, the United Nations organs could recommend or decide on measures to be taken."

✓ It is submitted that treaties with other nations are not the proper constitutional means for the government of the people of the United States in their internal affairs, which should continue to be regulated by our own federal and state and local legislative bodies through enactments which have their foundation in our own constitutional processes.

We subscribe whole-heartedly to the statement made by the late John Foster Dulles as Secretary of State, testifying before a

sub-committee of the Senate Judiciary Committee on a proposed constitutional amendment to limit the effect of treaties as internal law within the United States. He said (Hearings, 83rd Cong., 1st Sess. 824-825-1953):

"I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern." The United States should, he felt, "favor methods of persuasion, education and example rather than formal undertakings"

"We do not ourselves look upon a treaty as the means which we would now select as the proper and most effective way to spread throughout the world the goals of human liberty to which this Nation has been dedicated since its inception."

We do not agree with the extravagant statement which has at times been made (Saction Report, p.16) that "in terms of a threat to international peace and security, the occurrence of genocide anywhere in the world is as much a matter of international concern as, for example, the spread of nuclear weapons"; nor with the further submission that when a number of other nations consid-

er a matter to be of sufficient concern to make a treaty about it, it becomes a matter of international concern cognizable as such under the Constitution of the United States.

This is the old bootstrap doctrine by which a domestic issue, not subject as such to regulation by treaty, can be transmuted by the very prohibited act of making it the subject of a treaty, into the arena of international affairs subject to regulation by treaty.

It is the same doctrine which gave rise to the dictum by the Department of State (Publication 3972, Foreign Policy Series 26, September, 1950), which we cannot accept either, that "there is no longer any distinction between 'domestic' and 'foreign' affairs".

If indeed the limitations contained in the Constitution of the United States are subject to circumvention by such jurisprudential sorcery, the matter becomes one of broad constitutional policy rather than of strict constitutional law; and it is submitted that our constitutional philosophy should not be so impaired by transplanting matters within our domestic jurisdiction into the international forum, subject to legislation by treaty and adjudication by international bodies.

There can really be no question that the crime which gave rise to the Genocide Convention - mass murder of Jews by the Nazis -

was committed with the encouragement and indeed at the direction of the Government of Germany.

It is our position that in order for genocide to be an international crime, and accordingly a matter of international concern appropriately the subject of a treaty with other nations under the Constitution of the United States, it must, by definition, be committed with the complicity of the government concerned - not merely by individuals.

When the Convention was being formulated, the representatives of the United States, backed by those of other Western nations, sought, as a sine qua non, to have genocide defined as having been committed "with the complicity of government", because its "delegation felt in fact that genocide could not be an international crime unless a government participated in its perpetration".^{*}

This demand was rejected, and under Article IV of the Convention, states-parties are required merely to enact legislation providing punishment for "persons committing genocide", and requiring trial of "persons charged with genocide", whether they are "pub-

^{*}See record of the proceedings of the Ad Hoc Committee in 1948, and especially the statement made on April 15, 1948, by Mr. Maktoz of the United States, chairman of the Committee, as to the position of the United States, and also the proceedings and votes in the Sixth (Legal) Committee (75th and 128th meetings), and the Official Records of the Third Session of the General Assembly, Part I, "Legal Questions".

lic officials or private individuals".

Instead, therefore, of including government complicity as an element of the offense required to constitute it a matter of international concern, Article VIII of the Convention, as already shown, permits "the competent organs of the United Nations" to interfere in the domestic affairs of member nations by hearing complaints as to the conduct of their individual citizens, and to "take such action . . . as they consider appropriate" against them.

The type of problem with which the United States might be faced in this regard, if it became a party to the Genocide Convention, is illustrated graphically, and quite startlingly, by a recent news item (see Time Magazine, December 12, 1969, p.20) which reported that a "San Francisco lawyer who represents the (Black) Panthers . . . revealed plans to go before the United Nations and charge the United States with 'genocide' against the Panthers".

Already before the United Nations in a petition stated to be supported by "such outstanding leaders" as Paul Robeson, Mrs. Corette Scott King, the Rev. Ralph D. Abernathy, William L. Patterson and Bobby Seale, addressed to the General Assembly, and published in 1970 in the form of a book entitled, "We Charge Genocide", a copy of which is filed with this statement.

The petitioners describe themselves as "being the first in

history to charge the government of the United States of America with the crime of genocide . . . with mass murder of its own nationals (and) with institutionalized oppression and persistent slaughter of the Negro people in the United States", a crime "prohibited by the conscience of the world as expressed in the" Genocide Convention.

The petitioners ask that the General Assembly "declare by resolution that the Government of the United States is guilty of the crime of Genocide against the Negro people of the United States"; that it "condemn the Government of the United States for failure to . . . observe its solemn international obligations under . . . the Genocide Convention"; and "finally, for whatever other measures shall be deemed proper by the General Assembly, under the . . . Genocide Convention, to secure the safety of the Negro people of the United States".^{*}

Another constitutional question of some significance arises out of the vagueness of certain provisions of the Convention. It provides, in Article II, for instance, that genocide consists of

^{*} In this connection, there is also filed herewith a copy of a news release of September 17, 1970, by the Cardinal Mindszenty Foundation, discussing background of the foregoing petition, and stating, inter alia, that "the U. S. Communist Party has ordered its membership to mount a full-scale campaign for Senate Ratification" of the Genocide Convention.

certain "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" by (b) "causing serious . . . mental harm to members of the group".

In its favorable report of December 8, 1970, on the Genocide Convention, this Committee proposed that in its ratification of the Convention, the United States should state expressly that it "understands and construes the words 'mental harm' . . . to mean permanent impairment of mental faculties".

In the Foreword to "We Charge Genocide", cited above, William L. Patterson, one of the petitioners to the United Nations, submits that "the psychological impact . . . of jimcrow and segregation in their subtle and covert forms does extreme mental harm to the group".

In Brown vs Board of Education,^{*} the Supreme Court of the United States went even further and held expressly that separation of Negro children

"from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely

^{*}347 US 483, 493, 494 (1954).

ever to be undone . . . (and) has a tendency to
 (retard their) education and mental development
 . . ."

In light of this holding by the Supreme Court, such an understanding as this Committee has proposed in recommending advice and consent to ratification, that "mental harm" is to be construed "to mean permanent impairment of mental faculties", would hardly deter any tribunal from determining that any form of local aggregation is within the definition of the international crime of genocide under the Convention.

Another understanding proposed by this Committee in its recommendation, made toward the close of the Second Session of the 91st Congress, that the Senate advise and consent to ratification of the Genocide Convention, is that the United States "understands and construes the words 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such . . . to mean the intent to destroy' such a group 'in such manner as to affect a substantial part of the group concerned'".

It is again submitted that such an understanding in ratification of the Genocide Convention by the United States would hardly stand in the way of a finding of guilt on such a charge as that of Mr. Patterson in his cited Foreword, that "America's racism is bringing about in part the physical destruction of the group".

Just as the United States and her political allies were unable to get "complicity of government" into the definition of genocide while the Convention was being formulated, they also acquiesced, at the insistence of the Communist block, in the omission of "political" from the categories of groups as to which genocide is to be prohibited.

The original United Nations Declaration against Genocide, adopted by the General Assembly in December 1946, denounced genocide whether "committed on religious, racial, political or any other grounds" (emphasis added). When this declaration was being converted into the Convention, the Communist nations insisted on omission of "political" from the listed categories, and the United States capitulated; so that none of the Communist nations could, for example, ever be charged, under the Convention, with committing genocide by inflicting intolerable "conditions of life" on a political group, and seeking to destroy its members.

When this point was raised in the course of the debate before the House of Delegates of the American Bar Association at its mid-winter meeting in Atlanta on February 23, 1970, Nicholas Katzenbach, former Under Secretary of State of the United States said, in effect, that omission of "political" from the Convention was simply a "trade" in the course of compromise between the Communist and Western nations, by which "we succeeded in getting 'ethnic' "

included among the groups in place of 'political'".

Considering that "ethnic", in its ordinary meaning, is defined as "pertaining to or designating races", and that "racial" was already in the draft Genocide Convention, a compromise for insertion of "ethnic" in return for omission of "political" was acceptance of a stale, crumbling cracker for a carload of fine smoked hams.

This "legislative history" as to the circumstances under which the word "political" was omitted, on the insistence of the Communist nations, from the Genocide Convention, so that genocide as to political groups is not prohibited by that Convention, is explained and confirmed by the refusal of the Soviet Union to ratify the 1957 Convention on the Abolition of Forced Labor, because of its prohibition of the imposition of such labor as a means of political coercion, or as punishment for the expression of political views opposed to those of the government.

Aside from the answerability of governments for violation of the Convention, on charges filed with the United Nations, the treaty provides (Article VI) that "persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

Proponents of the Genocide Convention, ignoring the words of the foregoing Article that trials of persons charged with commission of genocide are to be conducted by a tribunal "of the State in the territory of which the act was committed", conclude that a United States citizen charged with genocide could, under no circumstances, be tried elsewhere than in a court of the United States.

The same egregious non-sequitur has been drawn to the effect that since there is no such international tribunal as is contemplated under this Article, no American citizen could be deprived of his constitutional right to trial by jury, or be forced into a trial in some foreign court under procedures not American.

It seems especially difficult to understand such fallacious syllogisms, especially in light of the provisions of Article VII of the Convention that genocide is not to be considered a political crime, and that the parties to the Convention "pledge themselves in such cases to grant extradition (presumably for trial in 'the State in the territory of which the act was committed') in accordance with their laws and treaties in force".

These jurisdictional and "extrajudicial" provisions raise important practical problems for the United States. The authorities in Hanoi have (see New York Times, November 29, 1969) charged that members of the armed forces of the United States have been guilty of committing genocide in "the alleged massacre of civilians in a South

Vietnamese village".*

If the United States were a party to the Genocide Convention, she would necessarily have agreed that these soldiers would be subject to trial in Vietnam under the provisions of Article VI, and, if the United States and Vietnam should have an extradition treaty, would be subject to extradition for trial in Vietnam, even if deemed (or even found) innocent in this country.

Of course, no extradition would be necessary as to our American prisoners in North Vietnam. That country, it may be assumed, would cite the Genocide Convention, if we were a party to it, as our consent to trial of those prisoners on such charges in that country, with the Nuremberg trials as a precedent sanctioning such procedure.

It is true that this Committee, in its favorable report on the Genocide Convention during the 91st Session of the Congress, recommended that the United States should, when ratifying the Convention, state that it "understands and construes Article VI" thereof as containing nothing which would "affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State".

* A copy of this New York Times article is filed herewith.

It is submitted, however, that such an understanding would, under no circumstances, deprive any other country of its concurrent jurisdiction over the trial of such individuals, especially since the understanding pointedly fails to negative the obligation of the United States, under Article VII, to grant extradition of its citizens for trial in other countries with which it has extradition treaties.

This suggestion in turn raises another interesting, serious and really dangerous question for the United States. The so-called "Nuremberg defense", universally pleaded in war-crimes trials, is that the accused was following orders which he was required to obey. Article IV of the Genocide Convention provides:

"Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

As stated by the ABA Section of Individual Rights and Responsibilities, in its Report (p.19) favoring ratification of the Genocide Convention:

"The Genocide Convention makes clear, in Article IV, that in respect of the crimes specified, no one, not governmental officials, not private indi-

viduals, can escape responsibility for his action through this (Nuremberg) defense."

In his dissent from the foregoing report, Mr. Ben R. Miller, a member of the Council of the Section, posed a serious question in this regard:

"Would not the military strength of this nation, and hence the nation itself, be endangered if, in following orders of a superior officer in the heat of battle, subordinates would be faced with instant decision of whether to risk court martial for refusing to follow orders, or punishment for genocide if a (tribunal) in the calm aftermath of a war could consider the result of following a particular order to have been genocide? For the Treaty abolishes the defense of subordinates that they were but following orders of their superior officers."

As has already been noted, under Article VI of the Convention, "persons charged with genocide" may be tried either before a tribunal of the country in which "the act was committed", or before "such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction".

Opponents of the Genocide Convention have insisted that if the Convention were ratified by the United States, there would always be the possibility of trial of an American citizen accused of genocide thereunder before an international penal tribunal when, as and if such a court should be established and its jurisdiction accepted by the United States, without the constitutional safeguards by which he would be protected in a court of the United States.

To this the proponents of the Convention say (Section Report, pp.25-26) that "the answer is simple. No such tribunal has been established"; and they add:

If one were established, parties to the Genocide Convention would have the option whether to accept its jurisdiction or not. For the United States, that option would have to be independently exercised through the Treaty Power, that is only with the advice and consent of the Senate by a two-thirds vote."

In the first place, this is just the type of objective which would probably be sought to be reached by an executive agreement without the advice and consent of the Senate. This point is well illustrated by the case of the International Anti-Dumping Code, concluded by the United States with seventeen other nations in Geneva on June 10, 1967. All of those seventeen countries treated

this Code as a formal treaty requiring parliamentary approval - and so ratified it.

The United States alone dealt with the document as an executive agreement, and because certain of its provisions were in direct conflict with corresponding provisions of Congressional tariff acts, the Code was not submitted to the Senate for its advice and consent, for fear of adverse action by that body.*

There would quite possibly be no practical way in which to assert the invalidity of an executive agreement accepting, in behalf of the United States, the jurisdiction of an international penal tribunal established for the trial of offenders under the Genocide Convention, once that convention had itself been ratified by the United States.

Nor can it be said cavalierly that it is not contemplated by the United States that such an international penal tribunal is to be established at all. The minutes of the 74th meeting of the Sixth (Legal) Committee of the General Assembly of the United Nations, held at Paris in October, 1948, contain a significant state-

* See Public Law 90-634, 82 Stat. 1347 (October 24, 1968), 19 USCA 160, note (Suppl.), suspending certain provisions of the Code, and its legislative history in US Congressional and Administrative News (1968), Vol. 3, 4352 ff. See also Long, United States Law and the Anti-Dumping Code, 3 The International Lawyer, 464 (April, 1969).

ment to the effect that the United States Delegation stated that it "intended, at a later stage, to show the need for the establishment of an appropriate international tribunal" in connection with Article VI of the Genocide Convention.

George A. Finch, erstwhile deputy under-secretary of State, Professor of International Law at Georgetown University, Vice-President of the American Society of International Law and Editor-in-Chief of its Journal, in an address before the annual meeting of the Society at Washington on April 29, 1949, said:

"The proposals . . . to prevent genocide . . . have been framed so as to take American domestic questions out of the jurisdiction of American courts and place them under some form of international jurisdiction."

In a book on International Enforcement of Human Rights, Professor Paul Gormley of the University of Tulsa School of Law, states that

"A private individual must be able to prosecute an action before an international tribunal - in his own name - against an offending government, particularly his own."

Finally, the Bangkok Conference on World Peace Through

Law, held in September, 1962, unanimously adopted a resolution commending its committee engaged in a project entitled "Toward a Feasible International Criminal Court", and voted to give it all possible support and assistance.

How can it be said, in good conscience, in face of this wealth of background material to the contrary, that Americans may rest assured that ratification of the Genocide Convention by the United States at this time, will not carry with it ultimate establishment of an international penal tribunal for the trial of citizens of the United States charged with commission of offenses thereunder?

The concept of an international criminal court raises also an intriguing constitutional issue - especially if the court were to have its seat, as seems likely, outside the United States. The constitutional policy of the Declaration of Independence in this regard centers on its protest of the transportation of Americans "beyond Seas to be tried for pretended offenses"; and the Sixth Amendment to the Constitution itself gives to every person accused "the right of a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed".

How could an American charged with the commission of geno-

cide in the United States, he sent out of the country for trial before an international penal tribunal, if such a court were established, and its jurisdiction accepted by the United States under the Genocide Convention, in light of the foregoing clear guarantee of the Sixth Amendment's protection?

Another constitutional issue militating against ratification of the Genocide Convention arises out of the provision of its Article III(c) making punishable "direct and public incitement to commit genocide" vis-à-vis the First Amendment's guarantees of free speech and press. Suffice it to say here that there is at least grave doubt, under recent decisions of the Supreme Court of the United States, as to the effect to be given, even by that Court, to such a treaty provision in the circumstances of different cases - certainly completely incomprehensible to judges of an international tribunal to whom our concepts of freedom of thought and expression are chimeric mysteries at best.

It will be recalled that by the Connally Amendment to the reservation of the United States to its declaration of adherence to the International Court of Justice, it is stipulated that the United States is not to be subjected to the processes of that court as to disputes which are essentially within her own domestic jurisdiction "as determined by the United States of America".

To circumvent that reservational safeguard, it was provi-

ded by Article IX of the Genocide Convention that

"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

This Article clearly overrides the Connally Amendment, and subjects the United States to the unreserved jurisdiction of the International Court of Justice as to all matters involving the "interpretation, application or fulfilment" of the Genocide Convention.

Thus, if the United States should ratify that Convention, and a case should arise thereunder which our Supreme Court should hold to be one within this country's domestic jurisdiction and protected by the First Amendment to our Constitution, any party to the treaty could still bring the matter before the International Court of Justice, which could disregard completely the decision of our Supreme Court, and hold that the matter was not one of domestic jurisdiction, and was not protected by the free-speech guaranty of the Constitution of the United States - and the United States would be

bound by that decision despite the Connally Amendment.^{*}

Parenthetically, it is well to note at this point that all of the Communist nations have ratified the Genocide Convention, now that it contains no prohibition against commission of the crime on political grounds, but each of those nations has expressly reserved against jurisdiction of the International Court of Justice over disputes under the Convention.

It is especially interesting to note, in this connection, that, in the prayer of the pending petition to the General Assembly, charging that the "United States is guilty of the crime of Genocide against the Negro people of the United States", it is requested "that any dispute as to the applicability of the Genocide Convention to the crime here alleged be submitted to the International Court of Justice".

It is submitted that, in any event, the entire Convention presents constitutional issues devoutly to be avoided. As stated at the outset, in 1949 the American Bar Association resolved that the Genocide Convention should not be "approved as submitted", because "the suppression and punishment of genocide under an international convention . . . involve important constitutional questions", and

^{*} See Phillips, The Genocide Convention, 35 ABAJ 623, 625 (April, 1949).

the proposed convention "does not resolve them in a manner consistent with our form of Government"; and on February 23, 1970, the House of Delegates of the Association voted not to recede from the position of the Association as expressed in 1949.

In the final analysis, prohibition of genocide by treaty must inevitably become an exercise in futility. Adolf Hitler would hardly have restrained the frightful acts of genocide which gave rise to the Convention, even if it had been in existence, and Germany had been a party to it, during the Nazi reign of terror.

The Soviet Union and her Communist-block allies were not deterred from the 1968 invasion of Czechoslovakia by the non-aggression provisions of the Charter of the United Nations of which they are all proud members. And yet, incredibly, the Section Report advocating ratification of the Genocide Convention, states unequivocally (p.14) that no member state of the United Nations has ever "acted in deliberate defiance of the commitments it entered into" in the Charter!

The Convention on the Prevention and Punishment of the Crime of Genocide places in the hands of foreign nations whose peoples have never known such freedoms as are guaranteed under the Constitution of the United States, the power to judge whether those freedoms are being protected properly within our domestic borders.

It is submitted that an international convention whose

provisions may be invoked in an international forum when an individual commits a crime within the domestic jurisdiction of his own state, would cause far more friction between peoples and governments than does the evil which it seeks to correct, and would tend to promote war rather than to "maintain international peace and security" within the letter and spirit of the Charter of the United Nations.

(Genocide Convention, hearings, Subcommittee,
Committee on Foreign Relations, U.S. Senate,
92-1, March 10, 1971, pp. 23-81.)

DRAFTING OF THE GENOCIDE TREATY
By Alfred J. Schweppe

I make this statement as an appointee of the President of the American Bar Association, which is represented here by Mr. Eberhard Deutsch of New Orleans and me.

At St. Louis in 1949, the House of Delegates of the American Bar Association rejected the Genocide Convention on the ground that the treaty was so badly drawn, so full of holes and so fraught with dangers for the United States of America that it should not be approved in the form submitted, but made a recommendation to the United Nations to improve it.

In 1970, the House of Delegates again rejected the Genocide Convention in the form submitted.

A subcommittee of the Senate Foreign Relations Committee held hearings in January, 1950.

Since then nothing happened until February, 1970, when President Nixon, quite surprisingly, after its twenty years of dormancy during Democratic and Republican administrations, sent the Genocide Convention to the Senate for its advice and consent.

To cap the climax, the Convention was sent to the Senate on the advice of Secretary of State Rogers, who said that it was anomalous for the United States to fail to adopt the agreement after the leadership the United States displayed in drafting it.

In my judgment, as I shall briefly show, Mr. Nixon was badly advised by the Secretary of State, and the Secretary of State was badly advised by those who advised the Secretary of State, and those who advised the Secretary of State were themselves badly advised and oriented.

I am probably one of the few people in this room, perhaps the only one, who has painstakingly performed the drudgery of wading through the day-by-day and month-by-month proceedings in the United Nations committees that twenty odd years ago gave birth to the Genocide Convention.

Far from being an exercise in leadership by the United States, the cold record shows it to have been a pathetic case of abject follower-ship--so pathetic as almost to drive one to tears.

The United States delegation consistently caved on important matters of principle, and in order to get some kind of an agreement--any kind--abjectly acquiesced in a draft that is so faulty and confused that it does not prevent genocide where it regularly goes on (Czechoslovakia, Hungary, Poland, Africa, Asia) but, in a welter of confusion,

creates new international crimes (the treaty becomes the supreme law of the land) that will make endless trouble for the United States.

The record shows that these United Nations committee meetings were a bit like the present negotiations in Paris. We were always making major concessions, the Communists none.

Let me particularize a bit.

An originally drafted, the Convention included "political" as well as "national, ethnical, racial and religious groups." The Soviets announced that they wouldn't play unless "political groups" were expunged from the draft. They insisted on preserving the right to assassinate and exterminate the political opposition as essential to the safety of the state. Interestingly, as the vote shows, they were joined not only by the satellite Communist countries but by a considerable group of Latin American countries. Result: the United States yielded, and "political groups" were eliminated from the draft.

So now, notwithstanding wholesale extermination of political dissidents in Hungary, Czechoslovakia and Poland, for example, nobody charges Communist Russia with genocide. On the other hand, the United States is vigorously charged with genocide in the United Nations: You are familiar with the book "We Charge Genocide".

Next, in the historical development of the Convention, United States representatives insisted that there be

included in the definition of genocide the words "with the complicity of government," an obviously correct ingredient when related back to the Hitler massacres by Nazi Germany. But the Communists would have none of it, because their governments themselves are the active agents in dealing with dissidents. Result: this United States position was rejected and the United States acquiesced.

In addition to acquiescing in the exclusion of "Political groups" and exclusion of the phrase "with the complicity of government," the United States representatives agreed to the definition that there must be an intent to destroy the groups actually named "an such," thus rendering the Convention meaningless. Soviet Russia and its cohorts could readily approve it. This hopeless weakness in the Convention has also been pointed out in an article appearing in the Congressional Record for July 6, 1949, p. A4510.

We also acquiesced in the injection of "part of a group." Thus genocide under this draft can now be committed under the draft treaty by a single individual against another single individual--now a domestic crime, but lifted by this convention to the level of an international crime, triable in the country where committed.

Pity the poor American caught abroad and charged with intent to inflict bodily or mental harm on a member of a racial group!

Then our representatives acquiesced in injecting "mental harm" into the Convention, thus opening the way for a Pandora's box of claims.

All in all, ours was a pathetic performance. Out came a convention that the Soviets could readily approve, and which surely will cause us, if it becomes the supreme law of the land (superseding state laws and constitutions and existing laws of Congress) endless trouble. Nobody will charge the Communists with Genocide; they are immune. But we will be, already have been, charged as fair game.

In 1950, the Senate Foreign Relations Committee headed by Senator Connally of Texas, having before it the Genocide treaty from Mr. Truman for the advice and consent of the Senate, ordered hearings chaired by Senator McMahon of Connecticut. These hearings were extensive, running over a number of days. Mr. Carl Rix, former President of this Association, the late George Finch, then and for many years editor-in-chief of the American Journal of International Law, and the greatest and most learned international lawyer I have ever met, and I (who had by then succeeded Mr. Rix as Chairman of the Peace and Law Committee) appeared and testified. We analysed the Convention in detail and pointed out its many faults and weaknesses.

With these hearings and the expose of the Convention's hopeless inadequacy, the Genocide Convention went into

hibernation--we thought permanently, unless redrafted by the United Nations to become meaningful. But now after twenty years it is sought to be resuscitated by the Nixon administration and also in here in the Senate, whose approval is necessary.

It is significant, I think, that Dean Rusk, who as Assistant Secretary of State presented the State Department's position to the McMahon sub-committee in 1950 (I heard him do it), has been Secretary of State of eight years under two recent presidents, but did not see fit to revive the Genocide Convention, even with a heavy Democratic majority in the Senate.

Equally significant is the fact that while Mr. Nixon was a member of the Eisenhower administration and consulted as Vice President at the Cabinet level, Mr. John Foster Dulles Secretary of State, announced that the Eisenhower administration would not bring up the Genocide Convention.

While, as a Republican, I greatly admire Mr. Nixon and his conduct of his office and strongly approve many of the programs sponsored by him, on this Genocide proposal I strongly dissent. In my view he has been sold a bad bill of goods. I will not be a party to foisting on the American people a highly defective treaty which does not prevent genocide where it regularly goes on, but which, as the supreme law of the land, will cause us many problems and make us the

target of many false charges.

If it is now ratified, it will be a useless but troublesome piece of paper. The appropriate remedy is to have the United Nations write a good clearcut Genocide treaty with teeth in it for the Communists and everyone else.

Since Great Britain has been mentioned as approving the treaty, may I point out that Sir Hartley Shawcross, former British Attorney General, who has been a guest of our Association, said that the adoption of the Convention will delude the people into believing that a great step forward has been taken, whereas nothing has been accomplished.

I sincerely hope that the Senate rejects this attempt to approve the Genocide Convention in its highly defective form. I hope the Foreign Relations Committee and its subcommittee recommend that this rejection is necessary.

For the information of the Senate, I attach hereto as Appendix A the statement which I made before the McMahon subcommittee of the Foreign Relations Committee on January 24, 1950. It goes into much greater detail on the defects of the Convention. Nothing that has happened since has changed my views there expressed. Indeed, the immunity of communist conduct from genocide claims since that time has rendered any other views on my part impossible.

(Genocide Convention, hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 92-1, March 10, 1971, pp. 58-64.)

U.S. RETREATS IN NEGOTIATIONS

By Alfred J. Schweppe

Distinguished gentlemen, my statement will be very brief. My name is Alfred J. Schweppe. I am a member of the Seattle bar. I suppose I am here in part by appointment of the American Bar Association because of a certain grandfather position I have with respect to the Genocide Convention. I am the only person still alive who presented the position of the American Bar Association committee in 1950 before the McMahon subcommittee, at which time there were extended 3-day hearings on the Genocide Convention.

U.S. RETREATS IN NEGOTIATIONS

I merely this morning would like to call attention to several items. There seems to be a misconception about the position of the United States in respect to the Genocide Convention. I find in the statement of the present Secretary of State, and I also find it in the committee report, that the United States took great leadership in the creation of this Genocide Convention. As a matter of fact, if you gentlemen will read the testimony which I gave in the 1950 hearings, where I traced step by step, after having spent many hours browsing through the proceedings of the United Nations as to how the present text of the Genocide Convention came into being, you will find that the U.S. delegation instead of exercising leadership, engaged in what I call a very pathetic case of followership. We retreated at every major point. I have described it as being like Napoleon's retreat from Moscow—a complete rout.

It was a complete rout of the American delegation. We took position after position in the negotiations in 1948 designed to make this a meaningful and effective convention, to protect people from destruction by governments or individuals acting in complicity with government. We lost the war when we acceded to the adamant Communist position, which is all a matter of record, that the word "political" must go out, and we fought and we fought, and we were outvoted on the question of political groups.

Once the word "political" was eliminated, the Genocide Convention, in my judgment, became ineffective and is today full of one of the word holes that could possibly be put into print by not including that word.

In my judgment, I think the Communists committed genocide in Hungary in 1956. I think they committed genocide in Czechoslovakia in 1968. I think they committed genocide in Poland recently. But that is a protected genocide because all they did in those cases was destroy the political opposition. The right to destroy the political opposition is especially reserved to all governments who are minded to destroy physically the political opposition.

We made a further point. We tried to insist that genocide could only be an international crime if it was done with the complicity of

government. We had to yield on that point. We retreated notwithstanding genocide could hardly be successfully committed without complicity of government.

As a matter of fact, in the Communist countries it is the government itself that takes care of the persecution and the elimination of political groups, and of religious groups. Those are governmental actions but they are protected because complicity of government is not included in the convention itself.

We retreated on other points. I say it was a most abject retreat; so let us not approve the Genocide Convention in this distinguished body on the assumption that we exercised great leadership in bringing about the draft of the convention which is before you. I think it is a first-class example of an unprecedented major retreat by the negotiators who represented the United States in bringing this convention into being.

"IN WHOLE OR IN PART"

Just one or two other comments. I have read with great interest the report of your committee. Two points strike me as being worth a comment. The convention itself provides that "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . ."

This committee has undertaken in a gloss to say that basic to any charge of genocide must be the intent to destroy the entire group.

Now that is an exact negation of the text which is to be construed not by this body but, under a later article to which the Genocide Convention refers, by the International Court of Justice.

Now, the International Court of Justice is not going to say intent to destroy a group in whole or in part means only to destroy a whole group. It can't mean that in definition—

Senator CHURCH. Mr. Schweppe, would you please refer to that place in the committee report where the committee has so construed the provisions of the treaty?

Mr. SCHWEPPE. Yes, on page 5.

Senator CHURCH. Page 5 of the report. Would you read it please?

Mr. SCHWEPPE. I will be glad to read it. "The first of these understandings serves to emphasize the importance which the committee attaches to the word 'intent.' Basic to any charge of genocide must be the *intent* to destroy an entire group because of the fact that it is a certain national, ethnical, racial, or religious group even though the acts effect only a substantial part of the group." That is in direct negation of the text.

Senator CHURCH. In what way do you find it so? This refers to the question of intent.

Mr. SCHWEPPE. Well, the text says with the intent to destroy in whole or in part a group it means the intent to destroy part of a group. They don't have to destroy a whole group. As a matter of fact, in the submission made by the State Department in 1950, which is available to you, I think in those 1950 proceedings, the State Department at that time admitted or agreed that part of a group could

as a single individual. That is in the official records of the State Department, the 1950 submission. It could be a single individual. Yet, that construction is a direct negation of the text itself which will be construed by the International Court of Justice.

The point is further implemented, Mr. Chairman, I believe, on page 10. At the top of page 10, the committee says "as the term is accepted by the committee; namely, mass murder on a broad scale." But that isn't what the convention says. The convention doesn't say mass murder on a broad scale. It says the intent to destroy, in whole or in part, a group. I told my learned colleague, Mr. Deutsch, on the way coming up here that when the Senate redefines the Genocide Convention and says genocide is a different crime from the one that is set up in the convention itself this is virtually tantamount to rejecting the Genocide treaty, because genocide is defined in the treaty itself, and this subcommittee says that it doesn't mean that.

You say it means only that you must have the intent to destroy the whole group. The convention says you only need the intent to destroy part of a group; so there is a contradiction, gentlemen, in your report which I suggest that you very seriously consider.

JURISDICTION FOR PUNISHMENT

Only one other comment I would like to make, and that has to do with the jurisdiction for punishment, article VI. I have before me page 7 of your report where the text is set out, "Persons charged with genocide * * * shall be tried by a competent tribunal of the state in the territory of which the act was committed."

Therefore, any U.S. citizen who commits an act of genocide in any other country is subject to the jurisdiction of that court. In the text immediately below that convention paragraph, there is some discussion by the subcommittee of whether or not there is concurrent jurisdiction in the United States if a citizen of the United States commits genocide in a foreign country and there was some speculation that the United States might also have jurisdiction.

I want to make two points about it. First, the foreign tribunal has unqualified jurisdiction to try and convict American citizens for genocide committed in that country. There is nothing we can do to prevent it the way this convention is written.

Secondly, I suggest that as to the concept of concurrent jurisdiction, if it gives comfort to anybody, and it doesn't give any comfort to me because the foreign country has unqualified jurisdiction, I am very doubtful whether concurrent jurisdiction exists.

We have quite a number of Federal statutes which create a Federal crime, and it says the jurisdiction of this Federal crime shall be in the district court of the United States. Now we have case after case which says that the jurisdiction of the district court of the United States in those cases is exclusive. The state courts do not have jurisdiction, and this language reads just about the way these Federal statutes

do, the case "shall be tried by a competent tribunal of the state in the territory of which the act was committed," or by an international tribunal.

It doesn't say anything about trial in the jurisdiction of which the person happens to be a national if he was caught in a genocidal act in a foreign country. That foreign country has complete jurisdiction, I think exclusive jurisdiction, over a citizen of the United States if he commits an offense there and he will be tried there without the protection accorded to him by the Constitution of the United States.

CONVENTION DOES NOT PREVENT GENOCIDE

In my judgment, gentlemen, and I hope you will seriously consider it, we are all strongly opposed to genocide, I think genocide which is one of mass destruction of people, if you want to use that definition, or of parts of groups of people, is a very heinous crime. Nevertheless, this convention doesn't prevent it. It permits, and we have crass examples of it in recent years, of the deliberate destruction of the political opposition, and that is not genocide. Nobody here has filed a complaint with the United Nations that Russia committed genocide when it killed Hungarians, when it killed Czechoslovakians, and when it killed Poles. They were killed as political opponents, and that right was reserved.

As a matter of fact, there has been much discussion in this committee about Vietnam. There has been much written and speculated if U.S. troops were withdrawn immediately from Vietnam there would be mass assassination of South Vietnamese by the North Vietnamese when they take jurisdiction of the country, if they have power to do it. Yet that will not be genocide, because they would merely be destroying the political opposition.

So I suggest, gentlemen, that you have before you a convention that does not prevent genocide in the instances that are flagrantly in public notice and, secondly, it makes a lot of problems for the United States.

Nobody has charged the Soviets with genocide. Here is a book which charged the United States with genocide against the Negro people, and they take it seriously, if you take the opportunity to read this book. They claim that all of the things that the United States has done to the Negro people in one form or another are genocide within the meaning of this convention, and it is on file in the United Nations.

Now what the United Nations will do about it I don't know. It has recently been activated, but that is one of the things we face. We are going to be charged with all kinds of genocide but the Communist countries are not.

I submit to you gentlemen that the treaty as presented ought not to be ratified by the U.S. Senate by way of giving its advice and consent to the President's transmission.

(Genocide Convention, hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 92-1, March 10, 1971, pp. 54-57.)

UNCONSTITUTIONAL USE OF TREATY-MAKING POWER

By Senator Jesse Helms of North Carolina

Ratification of the Genocide Convention would mark a watershed in the history of law in the United States. If approved by the Senate, it would bring about profound changes in the independence of our legal system and the objectivity of our system of justice. Ratification of this Convention would amount to an unconstitutional use of the treaty-making power of the United States. It would violate basic principles of our Constitution and fundamental tenets of international law. While the notion of a treaty to prevent genocide has emotional appeal in the abstract, the difficulty of translating such prohibitions into workable law without doing violence to our system of justice has proved to be insurmountable.

The scope of the treaty-making power of the United States is defined and limited by both the Constitution and basic principles governing the law of nations. Justice Sutherland made clear the relationship between constitutional law and international law in determining U.S. treaty power in the famous case of the *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

The power of the United States to make treaties rested in the national government, not as one of the powers granted to it by the States through the Constitution, but as a natural and necessary part of its sovereignty. "As a member of the family of nations," Justice Sutherland observed, "the right and power of the United States in that field are equal to the right and power of

the other members of the international family. Otherwise, the United States is not completely sovereign."

However, the States did regulate the exercise of that power in the Constitution. The most obvious regulation of the treaty-making power is Article II, section 2 of the Constitution which provides that treaties shall be made "by and with the advice and consent of the Senate" and that a two-thirds vote of the Senate is necessary for ratification of a treaty. Other limitations have been developed over time by the very process of operating a government under the Constitution. This tradition, beginning with the drafters of the Constitution, has limited the treaty-making power to those areas of concern which are of international character. Thomas Jefferson wrote in his manual of parliamentary practice that "if the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and cannot be otherwise regulated."

If we apply Mr. Jefferson's test for the constitutionally permissible use of the treaty power to the Genocide Convention, we find the Convention deficient. Genocide is a matter which falls outside the constitutional scope of the treaty-making power. It falls on both counts. First, genocide is a matter which, with the exception of the present convention, has never been regulated by treaty or customary international law. Although the word "genocide" itself may be of fairly recent origin, the acts which it describes have been occurring long before this century.

Historically, acts of genocide have not been considered to be within the domain of international law since they constitute criminal acts already regulated by the domestic law of all civilized nations. The acts defined by the Genocide Convention continue to be so prohibited by the domestic laws of almost every country of the world. Hence, Mr. Jefferson's second test also is not met by the Convention; namely, that it be a matter which cannot otherwise be regulated.

Making genocide, as such, a crime against the United States or of a particular State can be done without the assistance of a treaty. The legislative power of Congress and State legislatures is sufficient to protect Americans from these acts through our various criminal codes.

If genocide is of concern to the people of the United States, would not the wise course of action be to enact domestic legislation? If a specific legal prohibition of genocide is necessary, as a sign to the world that Americans oppose genocide, then why have the supporters of the Convention not brought forward legislation to amend the present federal criminal code to prohibit genocide? The fact that no such law has been introduced during the twenty-seven years in which ratification of the Convention has been considered reflects not only on the propriety of enacting such laws, but also upon the necessity of doing so.

The classic statement on the limited scope of the treaty-making power was made by Mr. Charles Evans Hughes, just before he became Chief Justice of the United States and after he had been Secretary of State. As President of the American Society of International Law, Chief Justice Hughes said that the treaty power "is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised . . . with respect to matters that have no relation to international concerns . . . There (is) a limitation upon the treaty-making power that is intended for the purpose of having treaties made relating to foreign affairs and not make law for the people of the United States in its internal concerns."

The noted international legal scholar, Charles Cheney Hyde, agreed with Chief Justice Hughes and maintained that: "by the adoption of the Constitution the Republic as a State relinquished the capacity to conclude treaties designed or calculated to restrict the American people in their purely internal concerns."

The Genocide Convention also violates this test of constitutionality. It is the essence of the Genocide Convention to regulate the "American people in their purely internal concerns." Article II of the Convention defines five categories of offenses which constitute the crime of genocide. These categories include acts which cause death, bodily injury, mental harm or kidnapping of members of a national, racial, ethnical or religious group. The Convention provides that genocide, conspiracy to commit genocide, public incitement to commit genocide, attempt to commit genocide and complicity in genocide shall also be punishable. These crimes, as defined by the Convention, are applicable to Americans acting within the jurisdiction of the United States. Under Article VI of the Constitution, the Genocide Convention, upon ratification, will become the supreme law of the land and will necessarily be enforced just as any section of the Constitution or law of Congress. It will have immediate domestic application as criminal law.

The most important duty of any nation under international law is to protect its external independence and its internal jurisdiction. The Genocide Convention violates both these essential aspects of national sovereignty. Its basic goal is to internationalize the domestic criminal law of the nations which are parties to it. As such, United States ratification of the Convention would violate the external independence and internal jurisdiction of the American legal system.

Criminal law is within the "reserved domain" of the domestic jurisdiction of a nation. It is a general principle of international law that a State has jurisdiction with respect to any crime committed in whole or in part within its territory. In the famous international law case known as *The Querschnitt*, a United States court held that the domestic criminal law of this country is not the proper subject of a treaty. The court stated:

"It is not the function of treaties to enact the . . . criminal law of a nation . . . Nor is there any doubt that the treaty making power has its limitations . . . Certain it is that no part of the criminal law of this country has ever been enacted by treaty." (5 F.2d 838)

Yet, this is indeed what ratification of the Genocide Convention would accomplish.

The regulation of international activity of the conduct of one nation to another—is the essence of the constitutional test of the treaty-making power. The treaty power may only be exercised with respect to matters which directly affect nations in their relationship with each other. In short, treaties, in the words of former Secretary of State John Foster Dulles, become "contracts between nations as to how they should act." But, by omitting governments from those responsible under its provisions for acts of genocide, the Genocide Convention is not a contract between nations as to how they should act, but a contract between a nation and its citizens, as to how they should act.

The American Law Institute, in its Restatement of the Foreign Relations Law of the United States, summarizes the constitutional limits of the treaty-making power as follows:

"An international agreement of the United States must relate to external concerns of the nation as distinguished from matters of purely internal nature. As the effect of international agreements is the creation or modification of relationships under international law, it would be inconsistent to utilize them for the regulation of matters bearing no relation to international affairs."

Again, the effect of the Convention concerning the actions of nations in their relationships with each other is so minimal that it can hardly be said to meet this basic test.

During nearly two hundred years, the constitutional purpose of the treaty-making power of the United States has not changed. Whether measured by Mr. Jefferson's test or that of Chief Justice Hughes or the American Law Institute, it is simply to promote the international interests of the United States by securing the action of foreign governments. I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures relating to matters of domestic concern. If ratified, the Genocide Convention will take effect in the United States as domestic criminal law.

The constitutional propriety of ratification of the Genocide Convention must ultimately be judged by the end sought to be achieved by the Convention. The substantial end of the Convention is not to regulate the actions of one government to another. Rather, it is an agreement entered into by a number of states to alter the criminal law within their respective domestic jurisdiction. A constitutionally proper treaty must be more than a mere subterfuge for the enactment of domestic legislation. The Genocide Convention is not.

(Genocide Convention, hearings, Subcommittee, Committee on Foreign Relations, U.S. Senate, 95-1, May 24, 16, 1977, pp. 104-106.)

THE GENOCIDE CONVENTION--TODAY AND TOMORROW

By Senator Jesse Helms of North Carolina

The United Nations Convention of Genocide responds to a deeply felt human need. The horror of genocide developed after World War II from a gradually expanding awareness of the Jewish Holocaust. This international perception grew backwards in time, as the understanding of genocide gave a name to the crimes against the Armenian people and the Ukrainians. Yet even though the Convention has been in effect since 1951 for those nations which have ratified it, and today 96 countries have ratified it, the Convention remains a dead letter in the face of unspeakable crimes against the Tibetans, the Cambodians, the Sikhs, the Afghans and a score of ethnic groups in Africa.

Why has the Convention been a dead letter?

Why has not a single case been brought under the Convention?

Some allege that the reason is because the United States, the most powerful nation on earth, has signed the Convention, but not ratified it. Yet there is nothing to prevent Great Britain, France, or Japan from going on the offensive against the perpetrators of genocide today. Nevertheless they do not.

Would the United States do so if the Senate ratifies the Convention? To bring charges of genocide against a nation would result in an almost irreparable break in relations. When this nation is reluctant to arraign the Soviet Union for a crime such as the shooting down of KAL 007 (and at the very least a breach of the multilateral civil aviation treaties), or for scores of plain violations of the strategic arms control treaties, is it conceivable that we would act against breaches of the Genocide Convention?

Moreover, there are serious conceptual flaws in the present construction of the mechanisms which are supposed to make the treaty work. Indeed, the deficiencies are so serious from a practical point of view that there is serious doubt that the Convention could work at all. Ambiguities of drafting, irreconcilable differences between political systems, political compromises, and a modicum of wishful thinking all combine to make the Convention a virtually unworkable arrangement. Even with ratification by the United States, the Convention can not and will not work to prevent or punish the crime of genocide.

Yet there is a humane wish to memorialize those who died in the Holocaust of World War II. The Convention is indeed a rhetorical statement, an expression of an international consensus against the crime that seeks to exterminate not just men and women, but a whole ethnic and religious group. The world owes a debt of gratitude to the victims of the Holocaust for raising the sensitivity of all nations to these crimes against humanity.

If the Convention will not work, but remains a worthy rhetorical gesture, why has not the Convention been ratified by the United States since it was sent to the Senate by President Harry Truman in 1949?

Quite clearly, the continued failure to ratify during the past 35 years has not been the result of some secret hankering after genocide by one-third of the Senate body. On the contrary, from the very beginning the Convention has raised serious doubts in the minds of Constitutional scholars, men of eminence and esteem. These arguments do not yield to the passage of time; they can yield, if at all, only to reasoned analysis. The objections raised in 1949 are fully as apt as when they were first made, despite weak, far-fetched, and strained attempts to explain them away.

Our distinguished former colleague, the former Senior Senator from North Carolina, Sam J. Ervin, Jr., summed up these arguments and extended their depth with his usual erudition in testimony before the Senate Foreign Relations Committee in 1970. The three Understandings and the one Declaration recommended by the Committee shortly thereafter were an attempt to respond to the issues raised by Senator Ervin; but they do not fully answer the questions he put forth. In consultation with Senator Ervin and other distinguished Constitutional lawyers, I have attempted to frame proposals which are inevitable if the Constitutional integrity and independence of this nation are to be protected.

These proposals have been under discussion very intensively with the Administration in the past ten days, and they have been re-drafted and perfected with the assistance of the Department of State and the Department of Justice with the intention of achieving the aims of President Reagan when he announced his support of the Convention on Genocide, "consistent with the United States Constitution." I believe that, with more work these new proposals will go a long way towards curing the Constitutional difficulties presented by the Convention, and may make it possible to ratify the Convention without doing damage to our Constitutional system.

HOW THE CONVENTION IS SUPPOSED TO WORK

The UN Convention on Genocide introduces a novel theory into international law. Certain acts, which hitherto had been considered as offences against the domestic law of a nation, are converted into offences against international law. The Convention requires each state-party to undertake to enact legislation punishing those acts as offences against international law. Each state-party also agrees to extradite persons accused of those acts to the country where the offense was committed, in accordance with its laws and treaties in force. The failure of a country to apply or fulfill the law would then be subject to review by the International Court of Justice (often called the World Court).

The novelty of the UN Convention lies in the sweeping nature of the domestic acts which are converted into international law. While we have used multilateral treaties in the past to set up international organizations, to establish rights in Antarctica, to regulate civil air traffic and hijacking, to control international traffic in narcotics, and to regulate radio frequencies and maritime

traffic, the subjects concerned were specific, truly international in scope, and to the practical benefit of all nations concerned. Treaties involving limited, mutual concessions of sovereign rights for mutual benefits are in themselves not novel. What is novel in the case of the UN Convention on Genocide is the surrender of sovereignty over internal acts which do not necessarily affect any other nation.

The fact is that we have 40 treaties which reference the International Court of Justice in some fashion—some even with compulsory jurisdiction. But not one of them declares an act to be "a crime under international law which they undertake to prevent and to punish." The Convention on Genocide stands alone in creating an international criminal statute. It sets a precedent that is totally unparalleled.

Whereas no one nation can effectively regulate international air travel or establish whatever radio frequencies it pleases for its own radio stations without agreement from other nations, genocide is a crime which can be perpetrated wholly within the borders of the offending nation, with no impact upon any other nation whatsoever. Of course we are all affected emotionally, and we may recoil in moral horror; but from the standpoint of international law there is no way to reach such a crime without altering the concept of the sovereign independence of nations.

Needless to say, no nation has a right, in its sovereignty, to commit genocide in its own territory. But neither is there a way to create a legal structure to punish a crime in another country that does not, in some way, subordinate all nations to some sort of international authority. If the international authority is weak, it will be ineffective; if the authority is strong, it has the potential to become an international tyranny. As a practical matter, a country that is capable of adopting a policy of genocide within its own borders is not likely to submit to international authority even if it is a party to the Convention. Would Hitler have been deterred by such a Convention? How would Germany have been punished short of the war that ultimately brought an end to the killing?

Some persons have advanced the theory that genocide is a proper subject of international law because it is a matter of "international concern." Yet many matters might be termed matters of "international concern." We might be concerned, for example, about the political or economic structure of another nation, structures, like communism, which we may consider inherently evil. Yet if the international community were to take steps to outlaw communism on the basis of "international concern," then our own system would likewise be a potential target of any group of nations that had "international concern." About our own social structure. In short, the evil that would come upon the world order by the adoption of "international concern" as a precedent for the development of international law would far outstrip the tactical benefits that might be gained in one particular case.

The potential for abuse of the Convention is not guarded by adequate checks and balances; nor is there any international consensus on the philosophy of law or human rights, which would serve as the foundation for a meaningful disposition of a case brought before the Court under the Convention.

Of course, not all acts of genocide are perpetrated within the borders of the offending country. When one nation violates the sovereignty of another nation for the purpose of committing genocide, then such action is properly a matter of "international concern," just like other acts of aggression. The Soviet Union's actions against the people of Afghanistan constitute a case in point. Such acts of genocide might very well be the subject of a multilateral treaty. Indeed, a case may be made, and should be made, based on the ambiguities in the Convention and the current status of international law, that the present Convention could be applied only to such international acts of genocide.

There are some, no doubt, who advocate an international order in which the sovereignties of nations are deliberately subordinated to international authority. For those persons, UN Convention on Genocide, as originally drafted, would be a major step forward to their ulterior goal. But for those who are not embarrassed by the exercise of U.S. sovereignty and independence, the UN Convention of Genocide, without the proper safeguards, is a dangerous instrument which attacks the Federal structure of the United States, and subordinates institutions created by the U.S. Constitution to an external body which we, as a nation, do not influence. The safeguards proposed by the Committee on Foreign Relations are meritorious and should be adopted; but in themselves they only begin to address the major problems.

THE THREE AMBIGUITIES OF THE UN CONVENTION ON GENOCIDE

There are three fundamental ambiguities in the UN Convention on Genocide. The first is the lack of precision in specifying whether genocide as an international crime pre-empts national sovereignty over its prevention and punishment. The second is the lack of precision in defining the terms of extradition. The third is the lack of precision in specifying the procedure under which the International Court of Justice assumes jurisdiction in disputes involving interpretation, application, and fulfillment of the Convention.

1. Genocide as an international crime.—Although Article I declares that "genocide, whether committed in time of peace or in time of war, is a crime under international law," nowhere does the convention draw a distinction between acts which may have been committed within the sovereign territory of a nation, and those which may have been committed across national boundaries. Nor does it state specifically the meaning of "a crime against international law." By definition, international law lacks the capacity to punish a crime. Indeed, many experts maintain that international law, as such, does not exist. There is a body of opinions, statements, treaties, and declarations; but law, without the attributes of sovereignty, is powerless to take action.

The difference is that, for the first time, there is an apparent attempt to set up a system to assure compliance. The system is tentative, and swathed in ambiguity, but it is a noose around the necks of nations. It may be a loose noose; but it is a precedent that many will seek to apply to new cessions of sovereignty in other fields.

The Convention acknowledges the incapacity of international law to punish offenders. In Article I, it declares that genocide is an

international law which "the Contracting Parties . . . undertake to prevent and to punish." In Article V, "the Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention . . ." Article IV spells out what this legislation must accomplish: "Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

Thus far, these actions are actions contemplated as taking place under the sovereignty of the contracting party. However, article IX sets up a mechanism for the review of these sovereign actions by an international body, namely the World Court. It states: "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." Thus, even though the United States had, in good faith, passed legislation which it considered to be "in accordance with" its Constitution, the ICJ could review that action, and set itself up as an interpreter of the U.S. Constitution.

Indeed, the ICJ would also be the interpreter of the meaning of the convention itself, and judge the United States by whatever guidelines it chose. Finally, it could declare that the constitutionally responsible rulers—the President, Senators, Members of the House of Representatives—had failed in the interpretation, application, or fulfillment of the convention, and hold that they should be tried under U.S. law.

If the actions under review had occurred within the United States, there would be suits in the Federal courts for damages and for enforcement of the laws; in the United Nations, there would be resolutions in the Security Council (where we have a veto) and in the General Assembly (where we do not). If the actions had occurred outside the United States, there would be demands for extradition, backed up by organs of the United Nations and world propaganda.

While in the long run, the United Nations would not have the power to enforce actions against the United States, the fact remains that, under the UN Charter, the United States has undertaken a solemn obligation to comply with any decision of the ICJ to which it is a party. If the United States were to reject an adverse decision—even one that was manifestly wrong, or an assault on our Constitution—we would be labeled as an international scowlaw.

Yet it is clear that the United Nations was never intended to treat the domestic affairs of its members. Article 2(7) of the UN Charter says:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.

If the UN Charter is interpreted by the same principles which guide our understanding of the U.S. Constitution, all parts of the UN Charter should be interpreted to be congruent with every part,

including Article 2(7). Under this principle, the domestic jurisdiction rule should also apply to the International Court of Justice, since the ICJ is established by Article 92 of the UN Charter and its Statute "forms an integral part of the present Charter." Any reasonable interpretation would conclude that the ICJ cannot treat of domestic matters.

Does that mean, then, that the UN Convention on Genocide must therefore be interpreted as excluding actions committed within a domestic jurisdiction from its declaration of genocide as an international crime? Does that mean that no country could be brought before the ICJ for actions committed within its jurisdiction?

A reasonable answer to these questions ought to be "Yes." If the United Nations cannot intervene in domestic matters, and the ICJ is governed by the UN Charter, then the ICJ has no jurisdiction at all over domestic matters. If the UN Convention on Genocide is interpreted by the same rule, then the declaration that genocide is a crime under international law must assume that domestic matters are not covered.

Who, then, determines what is a domestic matter? As far as the United States is concerned, the United States reserved the right to make that determination when it accepted the compulsory jurisdiction of the ICJ in 1946. The United States specifically declared that it accepted compulsory jurisdiction

Provided that such declaration shall not apply to . . .
disputes with regard to matters which are essentially
within the domestic jurisdiction of the United States. . . .

This was the so-called "Connally Reservation" named after the distinguished Chairman of the Senate Foreign Relations Committee in 1946.

Because of the failure of the UN Convention on Genocide clearly to resolve the confusion created by a declaration of "international law" that applies to matters which can be wholly within domestic jurisdiction, it is reasonable to assume that there was no intention to go beyond the concept of the UN Charter.

Unfortunately, there are some who argue that the intent of the UN Convention on Genocide was to amend the Charter and trespass into domestic jurisdiction by the use of the treaty power. They point to Article 36(1) of the Statute of the ICJ, which states:

The jurisdiction of the Court comprises all cases which
the parties refer to it and all matters specifically provided
for in the Charter of the United Nations or in treaties and
conventions in force.

Under this argument, the ambiguity of the "international law" declaration is dismissed, the sovereignty of the United States is swept aside, and the current practice of the United States with regard to compulsory jurisdiction of the ICJ in domestic matters is ridiculed as an embarrassment in modern diplomacy, or something incompatible with the UN Convention. The fact is that if the UN Convention on Genocide had intended to pre-empt domestic jurisdiction on the topic, it would have specifically stated that intent. But the Convention is silent on that point, offering only an ambigu-

ous statement that declines to indicate whether it intends to set aside the UN Charter or not. Presumably nations could set aside the Charter by a new treaty if they so wished; but in doing so they would have to use a clear and unambiguous statement. In that absence of a clear and unambiguous statement, the UN Convention should be interpreted in accord with the Charter and present U.S. law.

Unless this ambiguity is clearly removed with a proper understanding, the UN Convention on Genocide is too dangerous to our Constitutional system for the U.S. Senate to consent to ratification. A reservation is not necessary, since a reservation withholds the application of a portion of a treaty to the party making the reservation. But in this case the ambiguity of the Convention text is so strong that an understanding is a necessary and proper clarification of our view of the text.

2. *The ambiguity of extradition.*—The ambiguity of the extradition provision of the UN Convention on Genocide has always been identified, even by the proponents of the treaty, as one of its great weaknesses. Article VI states:

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

The awkwardness of the language and the apparent contradiction between the first sentence and the second render the actual obligation incurred difficult to interpret. The fact is that most extradition treaties provide exceptions for political crimes. Why should there be an exception for genocide? The political exception is commonly used as a safeguard against ideological harassment, and the protection of the accused's rights in situations where a fair trial is impossible. There is no reason to believe that charges of genocide will never be leveled in a political atmosphere; in fact, given the history of such charges in the UN General Assembly, we can be almost certain that the motivation for such charges will be political.

Moreover, Article VII must be read in the light of Article VI:

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

This article means that a U.S. citizen could be sought by another country with which we had an extradition treaty. The language itself is peculiar: it says the accused shall be tried in the territory "of" which the act was committed, rather than "in" which the act was committed. This means that the alleged crime need be committed only in relation to the territory affected. Article IV says that "constitutionally responsible rulers" shall be punished. This means that the President of the United States could be sought for extradi-

tion to a country which had been adversely affected by a foreign policy decision resulting in alleged genocide.

It is one thing to say that no President would ever consent to his own extradition. But what is the meaning of the Convention, then, if we have to rely upon its impracticality as our chief safeguard? Or suppose some other official were involved—an unpopular member of Congress, an Ambassador to the UN, or the governor of a border State? There is great leeway in the extradition process, but the accused's rights might be compromised by domestic political pressures, or international policy questions unrelated to the allegations.

In an attempt to cure the ambiguities surrounding the extradition process, the Committee has recommended an understanding which states:

That the United States Government understands and construes article VI of the Convention in accordance with the agreed language of the Report of the Legal Committee of the United Nations General Assembly that nothing in article VI shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the United States.

This has the appearance of an admirable understanding, even if it contradicts on its face the language of Article VI. Under the article, we pledge to extradite the accused in accordance with our treaties and law in force. We do not pledge in the article to try the accused in our own courts. Do we therefore assume an obligation through the understanding that we do not otherwise have under the Convention? Presumably we ought to have the right to decide not to try the accused. What do we do then? Do we ignore our extradition treaties in force? Or do we find some excuse not to enforce the extradition treaty? What rights does the accused have if, for political reasons, some future administration wants to extradite him?

Moreover, even though the extradition process requires that the action be a crime in both countries, will our interpretation of the crime be the same as that of the country demanding extradition? The structure of U.S. law is unique in the world. Not even Great Britain, for example, has our concept of First Amendment rights, or our safeguards for the accused.

The definition of genocide in the convention is therefore very important. Article II states:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

We can all envision the terrible consequences which such acts have played in the historical acts of genocide with which we are familiar. But could charges be brought under this language which are entirely remote from the historical meaning, but which might be laid for ideological reasons?

Consider the phrase "committed with intent." We have been told that this phrase was added at the insistence of the United States during the drafting phase because the concept of "intent" is absent in many, if not most, judicial systems in the world. But if this concept is unfamiliar around the world, how can we expect it to be interpreted by a court in another country? Or by the International Court of Justice?

Moreover, even in our own judicial system, some courts have heard arguments about "subjective intent" and "objective intent." What is the pattern and practice of repeated actions? How would a judge schooled in socialist or communist law interpret the results of a free economic system that did not seek equal redistribution of the wealth? With the Third World wedded to such stagnant economic theories as the North-South gap, and the concept that the industrialized nations succeed at the expense of the less developed nations, it is not improbable to expect charges that our economic system is "deliberately inflicting conditions of life calculated to bring about physical destruction" on a Haiti, a Bolivia, or an Angola.

In addition, there has been serious criticism about the vagueness of the terms. What is "a group"? What is "part" of a group? What is "serious bodily or mental harm"? The Committee has attempted to meet these criticisms by two understandings, which state (1) that "part" means "a substantial part" and (2) that "mental harm" means "permanent impairment of mental faculties." These two understandings help clarify serious ambiguities, but by no means all of them. We still do not know how many persons constitute "a group" or even what part of a group is "a substantial part." At one time the Black Panthers considered themselves "a group" and wanted the UN to consider law enforcement activities against them as genocide.

Similarly, "the permanent impairment of mental faculties" could mean the effects of torture or inhumane experiments. Or it could mean the toleration of a free society in which some persons could be bums or alcoholics. Some might even interpret the efforts of Christian missionaries to convert whole tribes away from traditional animist religions as genocides.

There also might be interpretations which could surprise many uncritical supporters of the convention. The provision which includes "imposing measures intended to prevent births within the group" will almost certainly be interpreted by some countries to mean that our international population control programs—even "private" programs which support abortion—constitute genocide. Programs that we proclaim to be voluntary are often perceived to be non-voluntary by other cultures. This lack of synchronization of cultural perceptions will create many problems in the extradition aspects of the Convention.

J. Ambiguities of Article IX.—Ultimately, the sovereignty issue becomes mired in the ambiguities of Article IX. Either Article IX

requires parties to the Convention to submit to compulsory jurisdiction before the International Court of Justice, or it does not. Many partisans of the Convention believe emotionally that Article IX, interpreted as compulsory jurisdiction, is the heart of the Convention. They believe that without the submission of the sovereignty of the parties involved to the jurisdiction of an international body the Convention cannot work.

But as we have already seen, there are many other reasons why the Convention could fail on the practical level. There is little hope that review by the ICJ could bring a real genocidal offender to punishment. Some envision the United States "going on the offensive" by using the mechanism of the Convention to haul other nations into the Court and make them respond to charges of genocide. But there is little reason to believe that the United States would be any more aggressive in using the mechanisms of the Convention than it has in using other mechanisms already available to go on the offensive against violators of international agreements. A charge of genocide is a hostile act whose consequences would have to be balanced against our strength and ability to see the process through.

On the other hand, compulsory jurisdiction could be a real source of harassment and an erosion of sovereign independence to any conscientious nation through the abuse of the treaty. An innocent nation has little recourse but to submit to the process of an international body that may be hostile and lack a true understanding of freedom. The abuse of the Convention by anti-American signatories could bring about the dissolution of our Constitutional protections. Since our only protection in that case would be to withdraw from the Convention, or even from the United Nations, it is clear that the best way to eviscerate the Convention would be to overload it with mandatory processes.

Yet, despite this controversy, the most amazing thing is to read the text of the Convention and find that the idea of compulsory jurisdiction is stated only obliquely at best. Article IX simply does not state that parties to the treaty must accept compulsory jurisdiction. The language says:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

This language states only that one party can submit a dispute to the Court. It does not say that either party must accept jurisdiction. It does not say that the Court is empowered to take jurisdiction. The language of the Convention refers to submission by one party.

Furthermore, no dispute has been submitted to the Court under the Convention since the Convention went into effect in January, 1951—despite the fact that numerous cases of genocide have been alleged by public opinion against parties to the Convention. Thus the Court itself has no history of execution of the Convention, nor any current practice under the Convention, to serve as a guide.

Since the Convention is silent on the question of compulsory jurisdiction, we must examine the UN Charter provisions establishing the Court, along with the Statute of the Court. But the UN Charter says only that the Court shall be the principal judicial organ of the United Nations, and that it shall function in accordance with the annexed Statute, which forms an integral part of the Charter.

Article 35 of the Statute says: "The Court shall be open to the parties to the present statute." The word "open" plainly does not confer any compulsory aspect.

Article 36(1) says: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force." The jurisdiction thus comprises three categories: (1) matters which the parties [plural] refer to it; (2) matters specifically provided for in the Charter [and the Charter does not specifically provide for genocide as a matter before the Court]; and (3) matters provided in treaties and conventions. Genocide, of course, is a matter provided for in the UN Convention on Genocide; but no mention is made in Article 36(1) of compulsory jurisdiction. To infer compulsory jurisdiction, one would have to resort to the Convention itself; but as we have already seen, the Convention is silent on compulsory jurisdiction.

Compulsory jurisdiction is first mentioned in the Statute of the Court in Article 36(2), which states:

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

The United States adopted such a declaration under Article 36(2) on August 3, 1946. However, the Senate adopted three reservations, the last two of which were:

Provided, That such declaration shall not apply to—

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- b. disputes within the domestic jurisdiction of the United States as determined by the United States; or
- c. disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the court, or (2) the United States specially agrees to jurisdiction.

Reservation (b) as noted earlier, is familiarly called the Connally Reservation after the distinguished Chairman of the Foreign Relations at that time, Senator Tom Connally. Exception (c) is familiar-

ly called Vandenberg Reservation after the distinguished Senator from Michigan who has gone down in history as one of the architects of the concept of a bi-partisan foreign policy. Both reservations may be said to represent the broad, historical conceptions of the independence of our legal system and its relation to international law.

The Connally Reservation is essentially a unilateral determination by the United States whether any matter presented to the Court is a domestic matter, and not within the compulsory jurisdiction of the Court. The intention of the Connally Reservation is to draw a clear distinction between domestic law and international law, ensuring that the foundations of our legal system are not judged by a body outside of our sovereignty. Although critics feared that the Connally Reservation would be used indiscriminately, there is no historical example where the Connally Reservation has not been exercised in good faith.

The Vandenberg Reservation also rejects compulsory jurisdiction with regard to multilateral treaties, under certain conditions. In addition, it allows the United States to waive those conditions, if it so chooses. Thus both reservations seriously qualify the compulsory jurisdiction of the Court under Article 36(2).

From the foregoing, we may conclude that (a) the Convention is silent on the question of compulsory jurisdiction; (b) the UN Charter provides no guidance in itself as to whether the Court has compulsory jurisdiction; (c) the Statute of the Court provides for compulsory jurisdiction only if accepted by the states-parties to the Convention concerned; and (d) the United States rejected compulsory jurisdiction for domestic matters as determined by the United States, and for some multilateral treaties.

Thus there is no reason for the United States to interpret the vague ambiguities of Article IX as requiring it to accept compulsory jurisdiction, and there is every reason not to do so. Our current practice does not require it. No nation has ever objected to the Connally or Vandenberg reservations.

Ironically, 17 nations have refused to interpret Article IX as requiring compulsory jurisdiction. Most, but not all, of those nations are Communist nations. But just because we disagree with Communist ideology, we should not blind ourselves to the fact that the reason the countries dissenting from Article IX did so is because they recognized the infringement on their sovereignty. Since the Convention provides for reciprocity, none of the 17 nations, including the Soviet Union, could drag us into Court. Even if we were to accept compulsory jurisdiction, we would not have to accept compulsory jurisdiction from a country that has not done so itself. But the treaty would be seriously unbalanced, nevertheless. The Soviet Union has plenty of surrogates who would be glad to raise false charges against the United States.

THE SUPREMACY OF TREATY LAW

Under Article VI of the U.S. Constitution, the Constitution itself, the laws made pursuant to it, and all treaties are equally the supreme law of the land. Article VI states:

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Many experts have been concerned that the Constitution might be read in such a way as to enlarge or diminish the rights and privileges guaranteed elsewhere in the Constitution. As John Foster Dulles said, in a speech delivered in Louisville, Kentucky, on April 12, 1952:

The treaty-making power is an extraordinary power, liable to abuse. Treaties make international law and also they make domestic law. Under our Constitution, treaties become the Supreme Law of the Land. They are indeed more supreme than ordinary laws, for Congressional laws are invalid if they do not conform to the Constitution, whereas treaty laws can over-ride the Constitution. Treaties, for example, can take powers away from the Congress and give them to the President. They can take powers away from the states and give them to the federal government or to some international body and they can cut across the rights given to the people by their Constitutional Bill of Rights.

The legal system of the United States is virtually unique in the world. No other country has the sweeping protections of our Bill of Rights built into its constitution. Not even Great Britain, Canada, and other heirs of the Anglo-Saxon system of law can boast of such thoroughgoing protection of the individual's right to speak, publish, or otherwise advocate his opinions without fear of governmental interference.

Nevertheless, without the proper precautions now, future generations could witness a full-scale attack on our free press based on the Convention on Genocide itself. Under Article III of the Convention, the "direct and public incitement to commit genocide" is punishable. While even the United States has some limits on the exercise of the First Amendment, there will be those who might argue that the Convention is sufficient authority to increase those limits, or otherwise take actions which would serve as a premise for limiting freedom of the press in other areas.

We must not forget that our "fulfillment" of the Convention could well come under the review of the International Court of Justice—and we know full well what other organs of the United Nations, notably UNESCO, have tried to do with the concept of the free press.

In 1976, when the Convention was last reported to the Senate Floor from the Committee on Foreign Relations, the Committee voted in favor of a declaration designed to address the concerns of those mindful of the issue raised by Article VI of the Constitution:

That the United States Government declares that it will not deposit its instrument of ratification until after the im-

plementing legislation referred to in Article V has been enacted.

While representatives of the State Department have maintained that this declaration provides a sure defense against the possibility that the Convention might in some way contravene the Constitution, some pronounced ambiguities remain which must be addressed if the sovereignty of the U.S. Constitutional system is to be protected against mischief in years to come.

The language of the 1976 Declaration refers only to a chronological sequence, which implies that the Convention will be applicable as domestic law only after the Congress passes the implementing legislation referred to in Article V of the Convention. State Department legal advisers testify in this regard that the Convention is not self-executing, that is, that it has no provisions which can become domestic law in the absence of legislation designed to implement our obligations under the Convention on the domestic scene.

However attractive this might appear, however, it does nothing to remove the danger that the Convention, once ratified, might itself serve as the foundation for far-reaching constitutional challenges to the United States, various of its federal, state, and local leaders, or institutions and individuals in the United States who are now protected by the First Amendment—notably the free press.

THE WORLD COURT EXPLAINED

One of the reasons why the United States was reluctant to submit itself to the International Court of Justice with regard to domestic matters is the insubstantial nature of the law which the justices of the court would apply, the lack of common philosophy of law or agreed-upon principles, and the fact that the United States has very little influence over the appointment of the justices, including any justice who supposedly represents the United States.

It has often been said that there is no international law. This is borne out by Article 38 of the Statute of the Court which say:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom; as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

What all of this means is that there is very little, in concrete terms, for the court to go on. After sifting through such things as "international custom" and general principles of law recognized by civilized nations," the justices can fall back upon "the teachings of the most highly qualified publicists of the various nations." This means that the basis of a justice's decision could be the last textbook he wrote. And all that failing, he resort to whatever strikes him as equity in the case (providing the parties are foolish enough to agree). At best, the Court is a super arbitration board.

The Court consists of 15 members, no two of whom may be nationals of the same state (Article 3). The members of the Court are elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration (Article 4). Thus the countries involved have no control, not even over the nominees from their own country. Article 5 provides:

At least three months before the date of the election, the Secretary General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present statute, . . . inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

In addition, Article 6 provides:

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

It is clear from this procedure that the elected representatives of the people in each country have no influence over the choosing of the nominees—nor, indeed, does any government in any way have such influence. The professionals in the field nominate themselves. The nominees then are voted upon independently by the General Assembly and the Security Council. Their only guideline is Article 9:

At every election the electors shall bear in mind only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the presentation of the main forms of civilization and of the principal legal systems of the world should be assured.

The judges are elected for nine years, on staggered terms, and they are expected to be on the job all the time, without any outside interests. The only requirement laid on a judge is that he, "before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously." (Article 20)

How this sometimes works out in practice was reported in *National Review* (October 5, 1984):

At World Court in The Hague the other day. His Honor Mahmoud M. Kashani, the Iranian justice, slugged His Honor Nils Mangard, the Swedish justice, and was hustled out shouting, "If Mangard ever dares to enter the tribunal chamber again either his corpse or my corpse will leave it rolling down the stairs."

The New York Times later reported that the United States asked for the expulsion of Judge Kashani and an associate from the American-Iranian claims tribunal set up by the Court.

Only states may be parties before the World Court, not individuals. However, Article VI of the UN Convention on Genocide contemplates the establishment of an "international penal tribunal" which would have "jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." This provision has been forgotten as an embarrassment, since no one is any longer proposing that an international penal tribunal be set up. Yet it remains a sleeper for the future. If the United States ratifies the UN Convention without the proper qualifications, then we can be sure that a campaign to establish such a tribunal would be put in effect, perhaps as an adjunct to, or in association with the World Court.

Little attention has been paid to this provision, because it is assumed that the United States would never accept its jurisdiction. But on the other hand, millions of Americans have been confident for decades that the United States would never accept compulsory jurisdiction before the World Court either. That is why the issue of the UN Convention on Genocide needs the most careful study of the consequences.

(International Convention on the Prevention and Punishment of the Crime of Genocide, Report, Committee on Foreign Relations, U.S. Senate, 98-2, Exec. Rep. 98-50, September 24, 1984, pp. 42-57.)

F. ARTICLES FOR THE CONVENTION

American Bar Association

**Report and Recommendations
of the
Standing Committee
on
World Order Through Law
on **The
Genocide
Convention****

CAUTIONARY NOTE

Only the RESOLUTION presented herein, when approved by the House of Delegates, becomes official policy of the American Bar Association. This is listed under the heading RECOMMENDATION. Comments and supporting data listed under the sub-heading REPORT are not approved by the House in its voting and represent only the views of the Section or Committee submitting them.

RECOMMENDATION

The Committee on World Order Under Law of the American Bar Association approves and recommends the following resolution for adoption by the House of Delegates of the American Bar Association:

"WHEREAS, in the field of human rights the United States of America has exercised significant leadership; and

"WHEREAS, the Charter of the United Nations, in the drafting of which the United States played a major role, pledges all Members to take joint and separate action in cooperation with the Organization for the achievement of . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion; and

"WHEREAS, it is in the National interest of the United States to encourage and promote universal respect for and observance of human rights and fundamental freedoms.

"BE IT RESOLVED that the American Bar Association favors the accession of the United States to the Convention on the Prevention and Punishment of the Crime of Genocide;" and

"BE IT FURTHER RESOLVED that copies of this resolution be forwarded by the Secretary of this Association to the President of the United States, the Chairman and members of the Foreign Relations Committee of the United States Senate, and the Ambassador of the United States to the United Nations; and

BE IT FURTHER RESOLVED that the Chairman or any representative of the Association's Standing Committee on World Order Under Law be authorized to appear before appropriate committees of the Congress, and to co-operate with the executive departments of the Government of the United States, to present the views of the Association as herein expressed."

REPORT

In support of the foregoing recommendation the Committee submits this report to the House of Delegates. The Committee considered the matters presented at the original hearings on Genocide before the Sub-Committee of the Senate's Committee on Foreign Relations in 1950, as well as reports of committees of the American Bar Association which preceded Senate hearings. In arriving at its conclusion it also had before it two recent studies, copies of which will be or have been distributed to all Delegates. One is the Report in Support of the Treaty-making Power of the United States in Human Rights Matters, prepared by the Special Committee of Lawyers of the President's Commission for the Observance of Human Rights Year, 1969. Justice Tom C. Clark served as chairman of that Committee (hereafter referred to as the Clark report). The second report is that of the Section on Individual Rights and Responsibilities, dated October 17, 1969.

The Clark report relates to the basic issue of whether human rights treaties *per se* are constitutionally supportable, particularly when dealing with the rights of individuals within their own country. The Section report relates specifically to the Genocide treaty. This Committee supports the conclusions of both reports.

In Justice Clark's letter of transmittal, dated August 20, 1969, he thus summarizes the conclusion of his committee:

"Our formal conclusions may be found at the beginning of our report. I would like to reiterate here, however, our finding, after a thorough review of judicial, Congressional and diplomatic precedents, that human rights are matters of international concern; and that the President, with the United States Senate concurring, may, on behalf of the United States, under the treaty power of the Constitution, ratify or adhere to any international human rights convention that does not contravene a specific Constitutional prohibition."

History from 1948 to date

On December 9, 1948, the United Nations unanimously adopted the International Convention on the Prevention and Punishment of the Crime of Genocide. Two days later it was signed on behalf of the United States with this statement: "The Government of the United States considers this an event of great importance in the development of international law and of cooperation among states for the purpose of eliminating practices offensive to all civilized mankind." It should be noted that unanimity of its approval within the United Nations was achieved in great measure by the leadership of the United States.

The treaty was transmitted to the U.S. Senate by President Truman on June 16, 1949. Extensive hearings were had before a Subcommittee of the Senate Foreign Relations Committee (81st Congress, 2d Session, on Executive O. January 23, 24, 25 and February 9, 1950). On May 23, 1950, the Subcommittee reported it out favorably with a declaration and certain understandings. No further action has been taken by the Senate; it has remained on the table ever since the spring of 1950.

As of January 12, 1951, the minimum number of states having ratified, the Convention came into force for those nations which had ratified it. As of this date more than 75 nations have ratified or acceded.

In April, 1969, Senator Fulbright, as Chairman of the Senate Committee, stated that it was his view that the Committee could resume consideration at any time the members wish. He noted that "the Committee's disposition may be influenced if the American Bar Association were to recommend ratification."

Purposes and Provisions of the Convention

The basic purpose of the treaty is to make Genocide an international crime whether committed in time of peace or of war. It seeks to prevent, if possible, and to punish when it occurs, the destruction in whole or in part, of a national, ethnical, racial or religious group, as such. The document, *inter alia*, defines Genocide, spells out the acts which constitute Genocide, the obligations which the parties undertake, the place of trial of the accused, and provides for submission of certain disputes to the International Court of Justice.

For an understanding of all the provisions of the Convention reference is made to the document itself, a copy of which is attached. However, the pertinent articles are as follows:

"ARTICLE I"

By Article I the parties "confirm that Genocide, whether committed in time of war or in time of peace, is a crime under international law which they undertake to prevent and to punish."

Articles II and III define Genocide and list the acts which are punishable as follows:

"ARTICLE II

"In the present convention, Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

"ARTICLE III

"The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit Genocide;
- (c) Direct and public incitement to commit Genocide;
- (d) Attempt to commit Genocide;
- (e) Complicity in Genocide."

Article IV includes among persons who may be punished those who "are constitutionally responsible rulers, public officials or private individuals."

Article V obligates the contracting parties to enact the necessary legislation to give effect to the provisions of the Convention and to provide penalties "for persons guilty of Genocide or of any of the other acts enumerated in Article III."

Article VI provides that "persons charged with Genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory in which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

Article VIII provides that "any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of Genocide or any of the other acts enumerated in Article III."

Article IX provides that "disputes between the Contracting Parties relating to the interpretation, application, or fulfillment of the present Convention, . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Prior Association Action

When the subject was originally considered by the American Bar Association there were considerable differences within the organization. The special Committee on Peace and Law Through the United Nations opposed ratification. The Section on International and Comparative Law supported ratification with certain reservations. The House of Delegates, acting upon the recommendation of a special committee of its own, in September, 1949 declined to approve ratification as submitted because it "involves important constitutional questions" and "raises important fundamental questions but does not resolve them in a manner consistent with our form of government."

Although the "important constitutional questions" or the "important fundamental questions" deemed inconsistent with our form of government were not spelled out, it is assumed that what was meant is what the opponents to ratification testified to at the subsequent Senate hearings on the treaty. The principal objections are reviewed herein.

The following paragraphs of the 1949 resolution of the House should be noted:

"Be It Resolved, That it is the sense of the American Bar Association that the conscience of America like that of the civilized world revolts against Genocide (mass killing and destruction of peoples); that such acts are contrary to the moral law and are abhorrent to all who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnical, racial or political group to which they belong; that Genocide as thus understood should have the constant opposition of the United States and of all of its people."

The matter has not been further considered by the Association since 1949.

The Existing U.S. Commitment

The United States, by an almost unanimous vote of the Senate, ratified the United Nations Charter and thereby assumed the obligation to further its objectives. One of these (Article I) was to achieve "universal respect for, and observance of, human rights and fundamental freedoms for all." Articles XIII, IV, LVI, LXII and LXVIII of the Charter spell out the commitments in greater detail.

As Phillip C. Jessup, now a member of the International Court of Justice, said in his *Modern Law of Nations* (p.91):

"It is already law at least for members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties."

Treaties and the Constitution

The opposition to the Genocide treaty has long asserted that the whole subject

matter of human rights is not a proper one for international agreements (treaties) and therefore Genocide must fall with all the rest. Since this question has been so thoroughly considered by the Clark committee, it need only be touched upon here.

The treaty-making power under our Constitution (Article II, Section 2) is very broad. Article II, Section 2 of the Constitution provides:

"He (the President) shall have the power by and with the advice and consent of the Senate to make treaties, provided two thirds of the Senators present concur;"

The power does not, of course, rise above the Constitution. But, subject to that limitation, it is extensive. As the Supreme Court said in *Geofrey v. Riggs*, 133 U.S. 258, 267 (1890):

"It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching on any matter which is properly the subject of negotiations with a foreign country."

The question of the treaty-making power in this area is thus answered in the Clark committee report (p.1):

"It may seem almost anachronistic that this question continues to be raised. It is nearly a quarter of a century since this country used the treaty power to become a party to the U.N. Charter one of whose basic purposes is the promotion of human rights for all. The list of parties to the various human rights treaties proposed by the U.N. has become longer each year. In each of the last 2 years the U.S. Senate has approved a human rights treaty without a single dissenting vote. In December 1968, the Chief Justice of the United States noted that "We as a nation should have been the first to ratify the Genocide Convention and the Race Discrimination Convention." And yet the suggestion persists that this Nation is constitutionally impotent to do what we and the rest of the world have, in fact, been doing."

Subject Matter May Be Both International and Domestic

It has been said in opposition to ratification that the subject matter of a treaty must be exclusively or essentially of foreign or international concern. But our history is to the contrary. We have repeatedly entered into treaties held to be valid covering matters usually considered domestic and left to local state regulation. These deal with such matters as debts, land titles, escheat, statutes of limitation, administration of alien estates.

For a list of subjects which are covered by treaties although of both local as

well as international concern see testimony, 1950 Senate Hearings on Executive O, p. 25, by the then Solicitor General of the United States.

It may be an oversimplification to suggest that if this country has the power to enter into a treaty to save the lives of birds, as was sustained in *Missouri v. Holland*, 252 U.S. 416, (1920), the same power must exist to save the lives of human beings.

It is interesting to recall that the United States has long accepted the view that the denial of human rights and other anti-social conduct are proper subjects of treaties. Thus the United States has entered into treaties prohibiting white slave traffic, traffic in arms, in narcotic drugs, and in slaves. The two human rights treaties recently ratified by the United States, after unanimous votes in the Senate, included the Supplementary Convention on Slavery (1967) and the Supplementary Convention on Refugees (1968).

Special note should be taken of the 1967 Slavery treaty because its ratification was specifically endorsed by the American Bar Association. It obligated the United States, inter alia, to abolish practices whereby "a woman, without the right to refuse, is promised in marriage on payment of a consideration of money or in kind to parents, guardian, family or any other person. . . ." and to abolish any institution whereby "a woman on the death of her husband is liable to be inherited by another." It is hard to conceive of something more likely to be an exclusive municipal subject than that of the right of inheritance.

No Self-Executing Provision

Another objection to ratification asserted is that the treaty would be self-executing. The result, it is claimed, would be to impose a law upon the citizens of this country without the Congress having enacted any implementing legislation. Article I does designate Genocide as "a crime under international law." But Article V requires the parties "to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the . . . Convention and . . . to provide effective penalties . . ." Could anything be clearer?

Even in the absence of the requirement of Article V, a treaty cannot support a criminal prosecution in the absence of Congressional action.

"It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing. . . ." *The Over The Top*, S F.2d, 838 (1925).

No Limitation on Speech or Press

Because Article III makes "direct and public incitement to commit Genocide" a crime, it is claimed the treaty would constitute an infringement of 1st Amendment Constitutional guarantees of free speech and press. It should be

noted again that the convention is not self-executing and does not make any act punishable under U.S. law. Only Congress can do this.

There is a distinction between advocacy and incitement. The Convention seeks to prevent "incitement" to commit a crime.

As the Court said in *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949) at 498:

"It has rarely been suggested that the constitutional freedom for speech and press extends to speech or writing as an integral part of conduct in violation of a valid criminal Statute."

More recently, in *Brandenburg v. Ohio* 395 U.S. 444 (1969) at 447 (89 S.Ct. at 1831) the Court said:

"... the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Place of and Trial by Jury

Fear has been expressed that because Article VI refers to a possible trial of an accused before "such international penal tribunal as may have jurisdiction" that an American citizen could be deprived of his constitutional right to a trial by jury, or be forced into a trial in some foreign court under procedures not American.

It is difficult to understand this objection to ratification in the face of the full Article VI which reads:

"Persons charged with Genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which have accepted its jurisdiction."

It is clear from the foregoing that, since there is no such international tribunal, the accused would be tried by a United States court. Nothing in the Convention makes mandatory American participation in an international tribunal. In the more than twenty years since the adoption of the Convention no such tribunal has come into being. Although a proposal for one was presented to the United Nations, it was last discussed by the Legal Committee in the UN in 1957, but the whole project was indefinitely postponed.

If at some future date such a court is in fact proposed, and if an appropriate treaty is adopted by the United Nations, and if the President of the United States decides to submit it to the Senate for its advice and consent, then and only then will this country, through its elected Senators, by open debate and after full consideration of its merits determine whether it wishes to agree to the court's jurisdiction. It seems most unlikely that any President with the support

of the Senate would ratify a Convention which in any way diminished the constitutional rights of Americans.

"Serious Bodily or Mental Harm" Not Vague

One other objection, more of phraseology than of substance, goes to the definition of Genocide, Article II (b) as including acts "causing serious bodily or mental harm to the members of the group." It is asserted that this is too vague to describe a crime.

It is clear, however, that the opening portion of Article II is specific enough to describe the crime and the victims. It reads:

"In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (b) (above)."

The drafting history of the Convention (debates in Committee 6 and Plenary of the 3rd General Assembly) establishes that serious mental harm would have to be inflicted on the group with intent to destroy it. As was said by the State Departments (Executive O, 81st Congress, 1st Session, 1950, Senate p.4): "The destruction of a group may be caused not only by killing. Bodily mutilation or disintegration of the mind caused by the imposition of stupefying drugs may destroy a group. So may sterilization of a group, as may the dispersal of its children."

Limitation of Article 2 (7) of UN Charter

It is asserted that by virtue of Article 2 (7) of the United Nations Charter and because murder is a matter of domestic concern, that the United States is barred from entering into a treaty on the subject. Article 2 (7) provides that "nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present charter."

This article, of course, is a limitation upon the United Nations, as it was established by the charter and upon such activities as depend on the charter for their authority. This does not prevent the member states from making any agreements they wish to make by new treaties to carry out one of the basic purposes of the United Nations. This is the exercise of sovereign power by any state which accepts the treaty. If any meaning is to be given to the ideals expressed in the purpose clause (and elsewhere) in the Charter, obviously it would not be an interpretation which prevents members from carrying forward these objectives.

Reference to International Court of Justice

Article IX provides for the submission, at the request of any party, of disputes relating to the interpretation, application or fulfillment of the Convention, to

the International Court of Justice. This is substantially the same provision as is contained in the treaties unanimously approved by the Senate in 1967 (Slavery) and in 1968 (Refugees). The former was approved by this Association. For a reference to earlier treaties containing a similar provision see hearings on the Refugee treaty (Senate, Executive Report no. 14, p. 11, 90th Congress, 2d Session, September 30, 1968).

Conclusion

This Committee concludes that there exist no constitutional objectives to ratification of the Genocide Convention. It recognizes no justifiable policy reasons for not ratifying. It deems ratification to be in the national interest and urges adoption by the American Bar Association of the resolution recommended by this report.

Submitted as of November 8, 1969

Nicholas deB. Katzenbach, Chairman
 Bruno V. Bitker
 S. William Green
 Rita E. Hauser
 Philip H. Lewis
 B.K. Roberts
 John R. Wilkins

John Carey

ABA Observer to the U.N.
 (Concurs)

(Genocide Convention, hearing, Committee on Foreign Relations, U.S. Senate, 92-1, March 10, 1971, pp. 196-207.)

American Bar Association

Section of Individual Rights and Responsibilities

RECOMMENDATION
THAT THE UNITED STATES RATIFY
THE CONVENTION ON THE PREVENTION AND
PUNISHMENT OF THE CRIME OF
GENOCIDE

REPORT BY THE SECTION OF INDIVIDUAL RIGHTS
AND RESPONSIBILITIES

CAUTIONARY NOTE

Only the RESOLUTION presented herein, when approved by the House of Delegates, becomes official policy of the American Bar Association. This is listed under the heading RECOMMENDATION. Comments and supporting data listed under the sub-heading REPORT are not approved by the House in its voting and represent only the views of the Section or Committee submitting them.

"For centuries, the advance of civilization has been measured by the progress made in securing human rights. The struggles that divide the world today center on questions of human rights. It is America's role and responsibility, as the brightest beacon of freedom, so to conduct itself as to provide an example that will truly light the world."

RICHARD M. NIXON

RECOMMENDATION

The Section of Individual Rights and Responsibilities recommends that the House of Delegates of the American Bar Association approve and adopt the following resolution:

"WHEREAS, in the field of human rights the United States of America has exercised significant leadership;

"WHEREAS, the Charter of the United Nations, in the drafting of which the United States played a major role, pledges all Members 'to take joint and separate action in cooperation with the Organization for the achievement of . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion;' and

"WHEREAS, it is in the national interest of the United States to encourage and promote universal respect for and observance of human rights and fundamental freedoms;

"NOW THEREFORE, BE IT

"RESOLVED that the American Bar Association favors the ratification by the United States of the Convention on the Prevention and Punishment of the Crime of Genocide."

PREFATORY NOTE

The foregoing Recommendation was adopted by the Section of Individual Rights and Responsibilities of the American Bar Association at its mid-year meeting in Dallas, Texas on August 13, 1969. The following Report was adopted by the Council of the Section on October 17, 1969. The Report was drafted by the Section's Committee on International Aspects of Individual Rights and Responsibilities. The members of that Committee are:

rita E. HAUSER, *Committee Chairman*

FRANK NEWMAN, *Vice Chairman*

ROBERT L. KENDALL, JR., *Secretary*

MORRIS B. ABRAM

BRUNO V. BITKER

THOMAS BUERGENTHAL

JOHN CAREY

CLYDE FERGUSON

RICHARD N. GARDNER

ANDREAS F. LOWENFELD

EDWARD D. MOLDOVER

FRANCIS T. P. PLIMPTON

ROBERT ROSENSTOCK

WHITNEY NORTH SEYMOUR

JOHN MINOR WISDOM

REPORT BY THE SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

INTRODUCTORY STATEMENT

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted unanimously by the General Assembly of the United Nations on December 9, 1948.¹

The United States Representative signed it two days later; on June 16, 1949, President Truman submitted the Convention to the Senate, with a view to receiving advice and consent to ratification.²

The Convention was referred to the Committee on Foreign Relations, and by that Committee to a special subcommittee created for the purpose, under the Chairmanship of Senator Brien McMahon of Connecticut. That subcommittee held elaborate hearings in January and February of 1950,³ and reported the Convention favorably to the full Committee, though with suggestions for a number of understandings and a declaration.⁴ Nearly all of the witnesses before the subcommittee had testified in favor of the convention. The opposition, however, was led by spokesmen for the American Bar Association, and

1. 3 U.N. GAOR 851, 179th meeting, Dec. 9, 1948. The official text is G.A. Res. 260, 3 U.N. GAOR Res. at 174, A/810 (1948).

2. S. Exec. Doc. No. 0, 81st Cong., 1st Sess. (1949).

3. Hearings on the Genocide Convention before a Subcommittee of the Committee on Foreign Relations, 81st Cong., 2d Sess. 1950. Hereafter "*Senate Hearings* (1950)".

4. The report of the subcommittee was not published. It was summarized in Legislative History of the Committee on Foreign Relations, S. Doc. No. 247, 81st Cong. 2d Sess. 27-28 (1950).

this opposition apparently made substantial impression on the full Committee on Foreign Relations. The Committee did not issue a report on the Convention during the 81st Congress, and has not taken up the Convention since then.

Nearly twenty years have gone by since that time. Both the world as a whole and the United States are very different from 1950, and the field of international relations has developed considerably. The present Chairman of the Senate Foreign Relations Committee, Senator Fulbright, has indicated that the Committee would be prepared to take up the Convention again, and that in any reconsideration the views of the American Bar Association would be highly influential.⁵

Accordingly, the Committee on the International Aspects of Individual Rights and Responsibilities of the American Bar Association's Section of Individual Rights and Responsibilities undertook a study of this matter and recommended that a Resolution be adopted by the Section and then by the House of Delegates of the Association recommending ratification by the United States of the Convention. Such a Resolution was adopted by the Council and Section of the Section of Individual Rights and Responsibilities and is being submitted to the House of Delegates for consideration at its mid-year meeting in February, 1970. This report is in support of that Resolution which expresses the American Bar Association's support for ratification of the Convention.⁶

5. Because of the long passage of time, there seems to be no point in a detailed review of the reasons for the Association's position in 1949-50 and the divisions within the Association at that time. See, e.g., 74 A.B.A. Rep. 145-150 (1949); 35 A.B.A.J. 957-960 (1949). The leader of the opposition to the Convention in the ABA meeting was Carl B. Rix of Wisconsin, Chairman of the Committee on Peace and Law Through the United Nations. The leader of the proponents of the Convention was Charles S. Rhyne, speaking on behalf of the Section on International and Comparative Law.

6. For the text of the Convention, see Appendix A.

THE GENOCIDE CONVENTION

The Genocide Convention was a direct result of World War II, and in particular of the realization emerging piece by piece in the mid-1940's that Hitler's vow to exterminate the Jews was not mere propaganda, but was the expression of a systematic policy in large part carried out.⁷ The International Military Tribunal at Nürnberg described the mass murders of the Jews of Europe, but considered that they were beyond the jurisdiction of the Tribunal, insofar as they were not directly related to planning and waging aggressive war:

"The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with any such crime [of aggressive war]. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter [establishing the Tribunal].

. . . ."⁸

The international community, as represented in the United Nations, responded promptly by a General Assembly resolution declaring genocide an international crime.⁹

Thereafter, the Secretary General of the United Nations, various committees of the Economic and Social Council, and the General Assembly itself, undertook the job of translating

7. The details of the "Final Solution" of the Jewish question has been spelled out in numerous documents since the end of World War II. For formal documentation, see *Nazi Conspiracy and Aggression*, Opinion and Judgment of the International Military Tribunal 82 (1947). For a brief post-war description, see W. L. Shirer, *The Rise and Fall of the Third Reich*, 659-65, 958-79 (1960).

8. *Nazi Conspiracy and Aggression*, Opinion and Judgment of the International Military Tribunal 84 (1947).

9. G.A. Res. 96 (I), Dec. 11, 1946, U.N. Doc. A/64/Add.1., Jan 31, 1947 at 188-89.

the resolution into a formal treaty. By 1948 the drafting was completed and the text of the Convention was adopted by the General Assembly by 55-0.¹⁰ According to Article XIII of the Convention, it was to enter into force ninety days after the twentieth instrument of ratification or accession was received. This took place on January 12, 1951.

As of September 1969, a total of 74 states have ratified or acceded to the Convention.¹¹ The United Kingdom has announced its intention to ratify the Convention and the Parliament adopted implementing legislation in March 1969.

The heart of the Convention is in Article I. By that Article, the Contracting Parties confirm that:

"genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish."

Whatever the detailed definitions in the rest of the Convention, it is clear that Article I would fill the gap found by the Nürnberg Tribunal. The Convention goes on in Article II to define genocide as:

"... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- "(a) Killing members of the group;
- "(b) Causing serious bodily or mental harm to members of the group;
- "(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

10. 3 U.N. GAOR 851 (Dec. 9, 1948). It is interesting to note that the Reporter for the Subcommittee which submitted the first draft of the Convention was Judge Charles Fahy, then Legal Adviser of the U.S. Department of State.

11. For a list of signatories and contracting parties, see Appendix B.

"(d) Imposing measures intended to prevent births within the group;

"(e) Forcibly transferring children of the group to another group."

It is worth noting that this definition goes beyond mass murder; it embraces also such crimes as mass sterilization, succumbing of the mind by drugs, and forced separation of children as a group from parents. So-called "cultural genocide"—destruction of cultural or religious treasures or suppression of schools—are not included.¹² The Convention proscribes, however, not only the actual crime of genocide, but also (in Article III) conspiracy, direct and public incitement, and attempt to commit genocide, plus complicity in genocide.¹³

Prior to World War II, states had generally been considered the only subjects of international law. The Nürnberg (and Tokyo) war crime trials wrestled with the problem and concluded that at least the principal rulers of a state were culpable and punishable for crimes against humanity.¹⁴ Article IV of the Convention modifies and perhaps expands this ruling, with a view to avoiding, at least in this area, the so-called "Nürnberg defense", whereby persons sought to escape blame for evil acts by asserting they were only carrying out the orders of others.

Enforcement of the prohibition of genocide is plainly not an easy problem. Obviously the main thrust of the Convention is not intended as a policing measure, but rather as a declaration and warning, and, as noted earlier, as a filling in of the

12. For a discussion of other suggested constituents of the crime and citation to earlier drafts, see Note: *Genocide: A Commentary on the Convention*, 58 Yale L.J. 1142, 1145 (1949).

13. For a discussion of the elements of direct and public incitement, see pp. 29-33.

14. *Nazi Conspiracy and Aggression*, Opinion and Judgment, 52-54 (Office of U.S. Chief of Counsel for Prosecution of Axis Criminality 1947).

gap that, rightly or wrongly,¹⁵ was found at Nürnberg. Nevertheless, the Genocide Convention was designed to be more than a mere statement, and it makes two provisions for enforcement. First, it provides (in Article V) that all contracting parties must undertake to enact the legislation necessary to punish persons guilty of the crimes enumerated in the first three articles. Second, it provides (in Article VIII) that any contracting party can call upon the competent organs of the United Nations—including the General Assembly and the Security Council—to take such action as they consider appropriate for the prevention or suppression of genocide or the crimes associated with it. Thus, the Convention contemplates both that states shall prevent or punish in their own territory acts by individuals prohibited by the Convention and that the international legal system—within its various limitations—shall prevent or punish acts by (or in complicity with) states, wherever they may be committed. In addition, the Convention contains in Article IX an agreement by all Contracting States to submit disputes about the Convention to the International Court of Justice.¹⁶

15. Considering the other innovations made at Nürnberg, including the basic step of formulating the crime after the fact, a link of the extermination policies pre-1939 to the aggressive war that was the major grievance of the charge might well have been sustained. See, e.g., Wright, *The Law of the Nürnberg Trial*, 41 Am. J. Int'l. L. 33, 61-62 (1947). For an explanation of the reason for the Tribunal's hesitancy and the sequel, see Lemkin, *Genocide as a Crime Under International Law*, 41 Am. J. Int'l. L. 145, 148 (1947).

16. The remaining Articles, X-XIX, are so-called "final clauses", relating to language, effective date, ratification and accession, duration, and denunciation.

SUMMARY

1. The Convention on the Prevention and Punishment of the Crime of Genocide is an international commitment to decency and morality consistent with the American tradition. It does not, of course, stand alone. Like other efforts throughout history, from the Ten Commandments through the Magna Carta, the English Bill of Rights, the French Declaration of the Rights of Man and the Citizen, the United States Bill of Rights, the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution, and the United Nations Charter, the Convention is a statement which advances individual rights and human dignity. The United States, which was founded on the basis of protest against governmental excesses, and which grew great in substantial measure because it was a haven and the hope for oppressed persons everywhere, should be in the lead in joining in the declaration of revulsion at the organized effort to eliminate a whole people during World War II, and of determination that such an effort shall not be undertaken ever again.

2. The great documents of human rights have taken various forms. From the laws of Moses to the pact between King and nobles at Runnymede, to the charters of the English, American and French Revolutions, to the constitutional amendments of nineteenth century America, the essential element was a statement of the rights of free men, coupled with punishment or threat of punishment to those who would abridge these rights. This pattern, too, was followed in the documents growing out of the rebirth after World War II, among them the Convention against Genocide.

Until 1945, the efforts to legislate internationally were very limited. The idea that the practices of states themselves could be illegal or could be made illegal dates from the twentieth century, and with one or two exceptions, from the end of the

Second World War. The Genocide Convention is designed to raise to the level of an international crime certain horrible acts, such as the effort of Nazi Germany to exterminate all the Jews within its domain, or attempts by other countries to exterminate other racial, religious, or ethnic groups within a given country or area.

The definition of genocide as of international concern reflects also the recognition that genocide is typically associated with threats or breaches of the peace. The most flagrant cases of genocide have occurred in major and "total" wars. Even lesser instances have tended to provoke retaliation, intervention by third parties, and a spread of war and devastation. Thus, steps to curb genocide are steps in the direction of preservation or restoration of peace.

3. The Genocide Convention recognizes that both states and individuals must be deterred in order to minimize the risk of genocide. Accordingly, states are made to answer in international organs—for example, the United Nations Security Council or the United Nations General Assembly, for actions taken by their governments that might constitute genocide, or actions taken in their territory—even without official government sanction—such as by guerrillas, commandos, or the like. In other words, a state is given—properly—the affirmative obligation to prevent and punish genocide within the area it controls.

In addition, individuals are told directly and explicitly that they cannot hide behind actions of governments in which they participate. Whether in anticipation of a war crimes trial such as those after World War II, or in anticipation of a change in government internally, all those who support or execute a policy of genocide are warned that the world will not tolerate or excuse their behavior.

Thus, while no one can be certain of the effectiveness of any given documents, the Genocide Convention goes far to make genocide unattractive even for those who would not shrink from it on moral grounds.

4. Earlier opposition to the Genocide Convention seems to have stemmed largely from a fear of expanded use of treaties generally. That fear is no longer relevant, as treaties by the thousands have been entered into by the United States and others in the past twenty years. One particular aspect of this fear, that by the treaty process the United States government would seek to enact civil rights legislation otherwise not constitutional or not possible of passage, has also been overtaken by events, as the major federal civil rights bills and scores of judicial decisions have removed whatever doubt there might have been in 1949 about the powers of the federal government in this area. Neither the Genocide Treaty nor the treaty power generally has played any part in these developments.

In addition to the general objections to the Genocide Convention, a number of specific provisions of the text of the Convention were criticised, some as providing "loopholes", others as extending coverage of the Convention too far or raising conflicts with the United States Constitution. None of these objections stands up to careful analysis.

5. The Genocide Convention is now twenty years old, but it is a living and important document. Our friends are confused, our enemies delighted, at continued United States hesitation about the Convention. Adhering to the Convention now would be a real step in the advancement of America's national interest.

DISCUSSION

I. THE GENOCIDE CONVENTION IS A DOCUMENT OF HUMAN LIBERTY CONSISTENT WITH AND IN THE FURTHERANCE OF THE AMERICAN TRADITION

The direct moving cause of the Genocide Convention, as already noted, was the systematic attempt by Nazi Germany to exterminate the Jews of Europe. The word genocide was coined in connection with a description of the policies of Hitler and his henchmen.¹⁷ But the essential element of the crime goes back long before the technical perfection of brutality achieved in the twentieth century.

The Romans not only conquered, but destroyed the people of Carthage; the Romans attempted to root out and destroy the early Christians; Mohamed boasted that he eradicated a Jewish tribe; during the Middle Ages, Crusaders attempted in various instances to eliminate men, women and children of the other faiths; Cortes in Mexico, Pizarro in Peru, and various North Americans as well, systematically eliminated nations, races or tribes of Indians. It is not necessary to present a complete list here.¹⁸ The point is that on numerous occasions in the past—recent as well as remote—states, leaders, and peoples with whom we feel a cultural kinship resorted to policies today deemed wholly unacceptable. This change in attitude finds its expression in the Genocide Convention, just as other changes in atti-

17. The author of the word was Professor Raphael Lemkin, see R. Lemkin, *Axis Rule in Occupied Europe*, 79-95 (1944). The word comes from the Greek *genos* (Latin *genus*) = race, tribe, or nation, and *caedere* = to kill. For a brief history, see Lemkin, *Genocide as a Crime Under International Law*, 41 *Am. J. Int'l L.* 145 (1947).

18. See, e.g., Lemkin, *Genocide as a Crime Under International Law*, 4 *U.N. Bull.* 72 (1948); N. Robinson, *The Genocide Convention* (1960).

tude found their expression in other documents in the development of our liberties. Unchecked personal rule of a king was acceptable in the Middle Ages, but unacceptable (at least in England) after the Magna Carta. The rights of individuals to bail, trial by jury, freedom from cruel and unusual punishment, and the immunity of proceedings in Parliament had developed gradually in the sixteenth and seventeenth centuries, but until the English Bill of Rights of 1689 it was not clear that the King could not suspend any of these guarantees, some by act of Parliament. The United States Constitution and the American Bill of Rights further developed the concept that there were laws higher than the will of the state, and developed the concept that certain acts were prohibited to government even when adopted by the legislature. Yet even the United States Constitution contains clauses that today seem abhorrent, such as the three fifths clause¹⁹ and the slavery clauses,²⁰ and it took the post-Civil War Amendments to bring our Constitution up to what would today be considered acceptable guarantees of individual rights. Even the Fourteenth and Fifteenth Amendments, as we have recently seen, have undergone substantial growth in the past few decades.

In each of the stages in the development of human liberty how much significance did a given document, amendment, or judgment have? In detail, of course, the answer varies from instance to instance. Speaking broadly, however, it is fair to say that the documents which became landmarks were produced when the time was ripe for them (or perhaps a little before), and that their impact went far beyond the immediate and enforceable issue. The lasting documents were persuasive documents, and they changed men's minds and men's lives.

Almost a quarter of a century has passed since World War II. While the past twenty-four years have hardly been a time

19. Article I, Sec. 2, cl. 3.

20. Article I, Sec. 9, cl. 1; Article IV, Sec. 2, cl. 3.

of peace, we have not seen again the horrors and excesses of the Second World War. Yet the possibilities of repetition cannot be put aside. The time is certainly ripe for the Genocide Convention, just as it was ripe in 1689 for the English Bill of Rights, in 1789 for the Constitution, in 1790 for the American Bill of Rights, and in 1868 for the Fourteenth Amendment. To stand aside from the Genocide Convention is to lose one's contact with the times. To say, as the United States has said until now, "We are against genocide, but we do not want to put it in writing," is to demonstrate insensitivity to the growth of an idea, in a manner not worthy of a great and freedom-loving nation. In practical political terms, not to sign the Genocide Convention is to dissipate one's influence, and to supply fuel for those who characterize the United States as the great hypocrite.

As Chief Justice Warren has said:

"We as a nation should have been the first to ratify the Genocide Convention. . . . Instead, we may well be near the last. . . .

"This sad record and the responsibility for it lie squarely with those who have a parochial outlook on world problems. They have failed to measure the element of change in the world. They have failed to recognize men and their institutions do not stand still in the face of great changes. We are not so uncertain of ourselves and our future that we cannot make our institutions conform to our needs as a progressive people."²¹

21. See Address of Chief Justice Earl Warren before the National Conference on Continuing Action for Human Rights (Dec. 4, 1968).

II. AN INTERNATIONAL CONVENTION OR TREATY IS THE MOST SUITABLE FORM FOR ADDRESSING THE DANGERS OF GENOCIDE

A. Treaties Are Today the Normal Means for Entering into Mutual Commitments for Common Purposes

Until the twentieth century, there were comparatively few general multinational treaties. The treaty power, both in the United States and other countries, was used primarily to settle boundaries, and to formalize certain limited kinds of commercial arrangements, especially with respect to shipping and fishing. Thus, not until the Versailles Treaty and the League of Nations Covenant did the United States, along with other countries, have to consider the feasibility and desirability of establishing international rules of conduct through treaties. Such concern as the United States—and others—had with treaties in the 1920's and 1930's was settled in 1945.

The United Nations Charter became not just a document creating an organization and establishing its internal rules; more important, the United Nations Charter became a general code of conduct, first for the victorious states in World War II, and now for nearly all states. In the Charter, drafted with the prominent participation of the United States, the signatory states agreed to join together “. . . to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and in encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. . . .” [Art. 1(3)];²² “to refrain in their international relations from the threat or use of force against the territorial dignity or political independence of any state. . . .” [Art. 2(4)]; “to settle their international disputes by peaceful means . . .” [Article 2(3)]; and to “promote higher

22. See also, Article 13(1)(b).

standards of living, full employment, and conditions of economic and social progress and development" among all nations [Article 55(1)]. All of these provisions (and as many more could be cited) involved, to some extent, limitations on sovereign states' absolute freedom of action; nearly all of them might involve matters typically thought of as subjects of internal legislation. But the decision was taken in Washington and in the chanceries and parliaments of now more than a hundred nations, that the limitations on one's own freedom of action was well repaid in the commitments of other countries to likewise recognize that each country's action affects all other countries and the peace and welfare of all mankind.

The successes and disappointments of the United Nations are not pertinent to this discussion. Certain it is that no nation—the United States included—has lived up fully to all the engagements in the United Nations Charter; but neither has any member state denounced the Charter or acted in deliberate defiance of the commitments it entered into. The point here, however, is a different one. The idea that treaties are the most solemn of international commitments, that they may and should be used to limit the actions of states and engage them in common pursuits, has been accepted, in the United States and universally. Further, and most relevant here, the idea has been accepted that treaties may and should be used to define what areas of individual and governmental activity are matters of international concern. In other words, nothing in the United Nations Charter nor in the many subsequent treaties—including the Genocide Convention—alters the basic principle that matters essentially within the domestic jurisdiction of states must be left to the states without outside intervention. What the Charter, and some of the treaties—including the Genocide Convention—do, is to say that certain kinds of activity are now the concern of all.

B. The Genocide Convention Deals With a Subject of Common Concern to All Mankind

The "principle" of international law, and of United States constitutional law that a treaty may only deal with matters of international concern²³ is, for all practical purposes, a tautology.²⁴ When some states—or, as in this case, 74 states—consider a matter to be of sufficient concern to make a treaty about it, then realistically it is of international concern. The practical significance of the rule might be to inhibit a President who has been unsuccessful in securing passage of a bill of local content, say a rise in the minimum wage laws, from putting the substance into a treaty with a foreign country, and then attempting to assert it as national law. The Genocide Convention presents, from the point of view of the United States, just the opposite picture. Far from attempting to achieve internal reform by international treaty, the Genocide Convention would turn a set of rules already followed in the United States into obligations binding on other states and individuals as well.

But the argument in favor of the Genocide Convention does not rest on these almost grammatical or verbal points. Genocide is of international concern, and for two equally compelling reasons. One, massive horror anywhere on earth affects everyone and every country; and two, the kind of issue comprehended within the definition of genocide²⁵ is nearly always

23. See, e.g., American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States*, § 117 (1965):

"(1) The United States has the power under the constitution to make an international agreement if

(a) the matter is of international concern, and

(b) the agreement does not contravene any of the limitations of the Constitution applicable to all powers of the United States."

See also, *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890); *Santo Vincenzo v. Egan*, 284 U.S. 30, 40 (1931).

24. For a full development of this point, plus tracing of various conceptions of the treaty power in United States constitutional history, see Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. Pa. L. Rev. 1012, esp. 1016-1026 (1968).

25. See pp. 4-5 and ante.

associated with threats to or breaches of international peace and security. The chief instance, of course, which gave rise to the Convention is associated with—indeed was an integral part of—the greatest holocaust that man has yet seen. Just a glance at more recent disputes, such as between India and Pakistan, between Nigeria and Biafra, Greeks and Turks on Cyprus, between Black and White in Rhodesia and South Africa, between Arab and Jew in the Middle East, shows how closely ethnic hatreds, national combat, and world peace are tied together. Whatever restraint an international document or treaty can have on the eruption or conduct of such disputes, on the behavior of victors or the revenge of vanquished is repaid a hundredfold in the overall prevention of world war. No one, of course, expects any treaty or indeed any law to be one hundred percent effective as a restraint on conduct of aroused peoples. But the relevance to the international community—in technical terms the subject of international concern—cannot be doubted. Seen in terms of a threat to international peace and security, the occurrence of genocide anywhere in the world is as much a matter of international concern as, for example, the spread of nuclear weapons.²⁶

26. Compare the Treaty on the Non-Proliferation of Nuclear Weapons, signed at Washington, July 1, 1968, S. Exec. H. 90th Cong. 2d Sess. (1968).

III. THE GENOCIDE CONVENTION PROPERLY FOCUSES BOTH ON STATES AND ON INDIVIDUALS

A. States Are Made Answerable Both for Commission and Tolerance of Genocide

The crimes which gave rise to the Genocide Convention—mass murder of Jews (also Poles and Slavs) by the Nazis was, of course, done with the encouragement and indeed at the direction of the government of Germany. Article VIII of the Genocide Convention makes it clear that were such an act to occur today, any other contracting party could bring the matter to the attention of the appropriate organ of the United Nations. Even if the complaint involved alleged prohibited action by one country against an ethnic group within its own country—for example, by Cyprus against its Turkish population or by Turkey against Armenians within its territory—the claim that the United Nations could not consider the matter because it concerned the domestic jurisdiction of one state within the meaning of Article 2(7) of the United Nations Charter²⁷ would be foreclosed. The Security Council, or the General Assembly, or the Economic and Social Council would all be authorized to hear the complaint. In appropriate cases, where the complaint was borne out by the facts, the United Nations organs could recommend or decide on measures to be taken, including fact finding, investigating, and, if the complaint showed a threat to international peace and security, sanctions under Articles 41 or 42 of the United Nations Charter.

Apart from the defense of domestic jurisdiction, a state accused before the world of genocide might contend that it was not the author of the acts complained of. Recent assertion by the governments of several countries in the Middle East concerning the activities of the "Fedayeen"—whether true or false

27. "Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. . . ."

—suggest that the possibility of a state's seeking to disclaim responsibility for terroristic activities within its territory are not as remote as once thought.²⁸ Such a defense, however, would also be unavailing. By Article V, the Convention places on all contracting parties the obligation of punishing persons guilty of genocide (or of the accessory crimes listed in Article III) on their territory. Nor could the absence of domestic legislation be a defense against states accused of harboring perpetrators (or accessories) of the crime of genocide. As soon as a state joins the Convention, it undertakes to enact, in accordance with its constitution, the necessary implementing legislation.²⁹ Thus while a state cannot be forced to enact legislation, and of course a court (or jury) cannot be forced to convict an accused person or persons, the Convention denies to any state the right to "wash its hands" of a charge of genocide alleged to have taken place in its territory, or to have been planned in or carried out from its territory.

B. Individuals Are Made Directly Responsible for Participation in Genocide

Perhaps the greatest lesson of World War II was that a small determined leadership at the seat of power can move an otherwise civilized and decent people to commit the most horrible barbarities. Everyone who has traveled since World War II to Japan returns with amazement that the friendly people he encountered were the same who, for example, raped and murdered their way through the Philippines. Everyone who has traveled in Germany is astonished that the decent and hard-working people he has met tolerated—and staffed—right in their

28. Cf. Note: Genocide, A Commentary on the Convention, 58 Yale L.J. 1142, 1147 at n. 40 (1949).

29. On June 6, 1969, the Economic and Social Council called for reports by all Contracting Parties to the Genocide Convention of their implementing or otherwise applicable legislation. U.N. Doc. E/Res./1420/XLVI (June 17, 1969). As of September 1969, 16 states have replied. See U.N. Doc. E/CN.4/Sub.2/303 and Add. 1-6. For a possible form such implementing legislation might take in the United States, see Appendix C.

midst the most horrible instruments of torture and destruction.³⁰ The answer given uniformly at all levels, from private conversation to formal interrogation to the major War Crimes Trials, is that the decision was not the individual's, but that he was obliged to follow orders. At the highest levels, as for Göring and Hess,³¹ or for the most egregious offenders, like Adolf Eichmann,³² the defense of superior orders was simply not accepted. At lower levels, the defense was often accepted, at least de facto.

The Genocide Convention makes clear, in Article IV, that in respect of the crimes specified, no one, not governmental officials, not private individuals, can escape responsibility for his actions through this defense.³³ To the extent an official—in a legislature, in a cabinet, an Army Command, or wherever—looks ahead, whether in a situation of war or of peace or in between, he must now know that if he gives his support to a proposed act of genocide, he will be personally liable.

In addition, where genocide is carried out, the perpetrators must know that (1) the state where they act is obligated to punish them; (2) any state to which they might escape is obligated to return them to the state where the acts were committed;³⁴ (3) and no state will consider genocide a political crime for the purpose of evading extradition.

Thus, the Convention approaches the issue of genocide from all directions. Officials cannot hide behind the "act of state";³⁵ states cannot escape responsibility by pointing at private individuals, and individuals cannot hide in their own or other states.

30. For instance, the concentration and extermination camp at Dachau was only 17 kilometers—about 10 miles—from Munich.

31. See *Nazi Conspiracy and Agression*, Opinion and Judgment 55-56 (Office of U.S. Chief of Counsel for Prosecution of Axis Criminality 1947).

32. For a concise summary in English, see Lord Russell of Liverpool, *The Record, The Trial of Adolf Eichmann for his Crimes Against the Jewish People and Against Humanity*, 304-305. For a discussion of the background of the defense of superior orders, see *id.* 346-351 (1963).

33. For a view that the Nürnberg defense is not entirely eliminated, see statement of Nehemiah Robinson in *Senate Hearings* (1950) 487, 501.

34. Subject, of course, to local laws and treaties regarding extradition.

35. Cf. *Underhill v. Hernandez*, 168 U.S. 250 (1897).

IV. THE GENOCIDE CONVENTION IS IN ALL RESPECTS CONSISTENT WITH THE CONSTITUTION, THE LAWS, AND THE IDEALS OF THE UNITED STATES

A. The General Objections to the Genocide Convention Made in 1949-50 Are Wholly Obsolete Today

The opposition to the Genocide treaty at the Senate hearings twenty years ago centered around three main points.³⁶ First, a general opposition to the "new concept" of government action by treaties. During the next two decades, the United States has entered into some 4,000 international agreements, without any noticeable diminution of its sovereign independence, nor any noticeable debasement of its standards to an international average. That treaties are the modern means of developing international law, just as statutes are the modern means of developing state and federal law, has been noted earlier, and hardly requires demonstration. If some felt nervous or cautious in 1949 about stepping on the new ground of multilateral treaties, including treaties affecting individuals, that fear is no longer justified. On the contrary, the only concern a United States citizen should have is that his country not be left out as the documents and issues of the new international law are drafted, debated, interpreted and applied.³⁷

Second, the opposition expressed the fear that by treaties in general, and by the Genocide Convention in particular, Article 2(7) of the United Nations Charter, dealing with matters "essentially within the domestic jurisdiction of states" was being undercut. In the words of the ABA Special Committee,³⁸ "Shall we be governed in internal affairs by treaty law or by laws

36. See *Senate Hearings* (1950) 154-230.

37. This point, in the context of the growth of international law in the post-war period, is developed by Bernard G. Segal, President of the ABA, in a recent address to the World Peace Through Law Conference, Bangkok, Thailand, September 1969.

38. 74 A.B.A. Rep. 320 (1949), *Senate Hearings* (1950) 160.

passed by Congress with a constitutional basis?" Again the answer has already been given. Article 2(7) is in no way undercut by the Genocide Convention. Domestic matters are as out of bounds for the United Nations as ever. The only effect of the Genocide Convention is to say that the issues specified in Articles II and III cover not merely one country, but all countries. If the United States wants (1) to take a complete hands-off attitude if genocide should occur somewhere in the world; or (2) to foster, shield, or protect the commission of genocide within the nation's borders, then it should certainly not join the Convention. If neither of these attitudes is real, then the argument has no appeal whatever.

Third, the opposition, focusing on certain enigmatic language of Justice Holmes in *Missouri v. Holland*,³⁹ considered that the Genocide Convention might be the opening wedge in a drive to exceed the legislative powers of the Congress vis-a-vis the states through use of the treaty power. Whatever theoretical merit there might have been with respect to this point, discussed for nearly ten years in the context of the proposed Bricker Amendment,⁴⁰ it has no relevance to the Genocide Convention. No one could have any doubt about the right of the Congress to prohibit genocide. Quite apart from the treaty power, the Constitution expressly grants to the Congress the power "to define and punish Piracies and Felonies committed on the high seas and Offences against the Law of Nations."⁴¹ And if anyone suspected that the Genocide Convention might be used to justify federal legislation in the field of civil rights, the events since 1949 have shown that the United States Constitution as currently understood is quite adequate to sustain any civil rights legislation likely to be proposed and passed, and certainly far more ample to coverage than any authority possibly derived from the Genocide Convention.

39. 252 U.S. 416, 433-434 (1920).

40. There were several versions of the Amendment. For the principal one, see S.J. Res. 1 as amended and reported favorably by the Senate Judiciary Comm. S. Rep. No. 412, 83d Cong., 1st Sess. (1953).

41. U.S. Constitution Art. I, sec. 8, cl. 10.

It is conceivable that a claim could have been made that depriving a racial group—say Negroes or American Indians—of the right to vote or the right to enjoy public accommodations is comprehended within Article II (b) of the Genocide Convention related to "mental harm". But this thought is hardly more than conceivable: as we have seen, the whole thrust of the convention and its origin suggest quite different goals; moreover, Article II (b) like all of the definitions of the crime of genocide, is governed by the phrase "with intent to destroy", which would not seem to apply to even the most extreme segregationist measures which may be tolerated by statute law in the United States.⁴² At all events the barring of school segregation, which was accomplished without any statute,⁴³ the passage of the Civil Rights Acts of 1957⁴⁴ and 1964⁴⁵ and the Voting Rights Act of 1965⁴⁶ all sustained by the Supreme Court, show that blocking the Genocide Convention has given and will give no comfort to opponents of federal enforcement of rights of minorities, while ratification of the Convention will add no powers to those the Federal Government already possesses.

Unconnected to the state-federal relation in the United States, the objection was also made in 1949-50 that the Convention undertakes to define a crime for which there would be punishment under federal law, without concurrence by the House of Representatives. This is simply a misunderstanding, resulting from a confusion about what is and what is not a "self-executing" treaty. In fact, ratification of the Convention would obligate the United States internationally to pass the

42. There have been, of course, deliberate lynchings or murders with racist aims. But such acts have always been unlawful.

43. *Brown v. Board of Education*, 347 U.S. 483 (1954). See also *Cooper v. Aaron*, 358 U.S. 1 (1958), *Griffin v. Prince Edward School Board*, 377 U.S. 218 (1964).

44. 71 Stat. 637 (1957), 42 U.S.C. 1971 (1964), sustained in *United States v. Mississippi*, 380 U.S. 128 (1965).

45. 78 Stat. 243 (1964), 42 U.S.C. § 2000a-h, sustained in *Heart Of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

46. 79 Stat. 437 (1965), 42 U.S.C. § 1973 (Supp. 1965), sustained in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

necessary implementing legislation, making the crimes specified punishable under United States law. Failure by the Congress to enact the implementing legislation would leave the United States in breach of an international obligation, but in such eventuality no one could be tried in the United States for a crime not specified in the Criminal Code. It is certain that no one can be accused of or tried for the crime of genocide in the United States until legislation making genocide a crime has been adopted in accordance with our domestic procedure for passage of a law.

To give an idea of what implementing legislation for the Genocide Convention might look like, a draft has been prepared and appears at Appendix C.⁴⁷ It may be noted that the draft follows the Convention closely, but not verbatim. Thus, for example, the words "aiding and abetting" have been substituted for the Convention's "complicity in", and a number of comparable small changes have been made. Needless to say, no international convention can adopt a form of words in every respect suitable for eighty or a hundred different legal systems. One of the objects of implementing legislation is to tailor a universal agreement to various local conditions. The draft in Appendix C, or some variation on that draft, could fully serve the twin purposes of adapting a general treaty to United States conditions and of preserving the principle that no one shall be punished by the United States for a crime, but upon conviction of an act prohibited by a law duly enacted by the Congress.⁴⁸ Any prosecution in the United States would be subject to all the safeguards provided in the Constitution, including the substantive guarantees in the First Amendment and the procedural

47. While the Departments of State and Justice informally discussed implementing legislation for the Genocide Convention, no government draft has been published. The draft has been prepared for this Report, for illustration only, and has no official standing.

48. It seems no longer necessary to address the possible overlap between the new federal crime and a state crime, such as homicide. Such overlap is by now accepted without question, in areas as disparate as civil rights legislation, kidnapping, bank robbery, possession of narcotics, and as many more. For an early and authoritative statement on this point, see *United States v. Arjona*, 120 U.S. 479 (1887).

guarantees in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments.

B. The Specific Objections Raised to the Genocide Convention Are Not Meritorious

In addition to the general objections to the Genocide Convention discussed above, a number of particular criticisms relating to the text of the Convention were made by opponents in 1949-50.⁴⁹ These are not of a dimension sufficient, singly or together, to warrant non-ratification.

"As such"

Why, it was asked, did Article II refer to the destruction of a national, ethnical, racial, or religious group *as such*? Does this not create an ambiguity? The answer is perhaps it does, but so would the phrase without these words. Conceivably, an edict to kill all restaurant owners might be a subterfuge to kill, say, all Chinese within a country. In such an event, the words "as such" would give a possible technical defense to the authors of the deed. But that possibility seems very remote. In the past, genocide has not usually been disguised. It has been part of a deliberate, public, and political or religious campaign. Rome set out to destroy the Carthaginians; Islam set out to destroy Christians; Hitler set out to destroy the Jews, *as such*.

"In whole or in part"

What did the addition of the words "in whole or in part" signify for the crime of genocide? Did it mean, in the words of one opponent, "driving five Chinamen out of town"?⁵⁰ The answer, again, is quite simple, and indeed, appears in the drafting history of the Convention itself.⁵¹ The object of adding

49. See *Senate Hearings* (1950) 154-221.

50. See *Senate Hearings* (1950) 154, 199, 201, 203.

51. The amendment containing these words was proposed by Norway in the debates of the Sixth (Legal) Committee of the General Assembly in its debates on the draft prepared by the Economic and Social Council. U.N. Doc. E/794 (May 24, 1948). The debates appear at 3 U.N. GAOR 6th Comm. 61, 92-97, Oct. 7, Oct. 13, 1948.

the words "in part" was to preclude an argument that international destruction, say, of half or two thirds of the Jews of Rumania was not comprehended in the crime of genocide.

In the context of this Convention, there can be no doubt about the distinction between intent to destroy a national, ethnical or racial or religious group and intent to destroy some individuals belonging to that group. Nothing in the history of the United States since the early Indian wars quite adds up to genocide within the meaning of this convention. If any race riot, lynching, or comparable event ever grew to the scale approaching genocide as defined in the Convention, the international obligation would surely add nothing to the determination of our own state and federal authorities to bring the perpetrators to full justice.

"Mental harm"

The thrust of the objection to this phrase, apparently, was that the critics did not understand it. As more facts of tortures both in Asia and in Eastern Europe during World War II have come out, as we have come to know about brain-washing in North Korea of our own soldiers, and in Eastern Europe of various political and religious leaders including for instance Cardinal Mindszenty, the objection to including mental harm along with bodily harm would seem to disappear.

"The place of trial"

One criticism of the Convention arose out of the possibility that, under Article VI, a person accused of genocide could be tried by an international penal tribunal, possibly without trial by jury and other safeguards to which a United States citizen is entitled under the Constitution. Again, the answer is simple. No such tribunal has been established.⁵² If one were established, parties to the Genocide Convention would have the option whether to accept its jurisdiction or not. For the United

52. The last time the proposal was seriously discussed appears to have been in the Sixth (Legal) Committee of the General Assembly in 1957. 12 U.N. GAOR 6th Comm. 155 (Dec. 5, 1957).

States, that option would have to be independently exercised through the Treaty Power, that is only with the advice and consent of the Senate by a two-thirds vote.

"Direct and public incitement . . ."

The question is raised whether Article III (c) of the Convention, in prohibiting "direct and public incitement" to commit genocide is contrary to the First Amendment's guarantee of free speech. The scope of the free speech protection in the United States Constitution has been subject to various interpretations through the years, particularly as it conflicts with public order.⁵³ Thus it is not possible to state categorically that any given statement is or is not protected free speech, as against prescribed criminal activity. Our best judgment, for reasons spelled out below, is that any activity sufficient to support conviction for violation of Article III (c) of the Convention would fall outside of the First Amendment's protection. But the case need not rest there.

Assuming the above judgment were wrong and an activity prohibited by the Convention were held to be protected by the First Amendment, the conviction would simply be reversed. Nothing in the development of the treaty power suggests any other result. Indeed, in *Missouri v. Holland*,⁵⁴ the case most often cited as pointing the way toward expanded use of the treaty power, Justice Holmes specifically limited his speculation to "some invisible radiation from the general terms of the Tenth Amendment," [relating to reserved powers of the states] and not to "prohibitory words to be found in the Constitution," such as the First Amendment. Thus reversal of a conviction on free speech grounds would be perfectly within the powers of the Supreme Court (or indeed a lower court), notwithstanding anything in the Convention. Indeed, the Convention itself only requires (in Article V) that states undertake to enact, "in

53. For a thorough presentation of cases and scholarly discussion, see Emerson, Haber and Dorsen, *Political and Civil Rights in the United States* 512-601 (1967).

54. 252 U.S. 416, 433-34 (1920).

accordance with their respective Constitution" the necessary legislation to give effect to the Convention. If a portion of the implementing legislation were declared unconstitutional, generally or as applied to a given defendant, there would be no breach of the obligation under the treaty.

If the above possibility were very strong (and if incitement to genocide were the major provision of the Convention), there might be some cause for hesitation about the Convention.⁵⁵ In fact, it appears that Article III (c) is drawn precisely to satisfy the prevailing interpretations of the First Amendment to the United States Constitution.

Mr. Justice Holmes stated the argument in favor of the constitutionality of a provision such as Article III (c) in speaking for the Supreme Court in *Frohwerk v. United States*,⁵⁶ decided just after World War I.

"We think it necessary to add to what has been said in *Schenk v. United States* * * *⁵⁷ that the first amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

The same thought was expressed thirty years later in a case involving an injunction against peaceful picketing to induce violation of a state law concerning trade.⁵⁸

55. It would, of course, be possible to ratify the convention but omit the language corresponding to Article III(c) from the implementing legislation. That course is expressly permitted by Article V. For the reasons stated in the text, however, this course is not here advocated.

56. 249 U.S. 204, 206 (1919).

57. 249 U.S. 47 (1919).

58. *Giboney v. Empire Storage Co.*, 336 U. S. 490, 498 (1949).

"It has rarely been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."

It is worth pointing out that the author of that opinion, for a unanimous court, was Mr. Justice Black, surely a justice sensitive to violations of the First Amendment.

It is, of course, not easy to distinguish in all cases between permissible and impermissible expression, or between condemnation of a racial, religious, or ethnic group and intent to destroy such a group. The distinctions drawn by the Supreme Court in this area—for example, between *Chaplinsky v. New Hampshire*,⁵⁹ *Terminiello v. City of Chicago*⁶⁰ and *Feiner v. New York*⁶¹ are not easy. If a person were arrested and prosecuted for inciting to genocide, doubtless the factual issues would be scrutinized with great care. The dividing line was expressed best, perhaps, by Mr. Justice Brandeis in his famous concurrence in *Whitney v. California*.⁶²

"* * * even advocacy of violation, however reprehensible morally, is not justification for denying free speech where advocacy falls short of incitement and there is nothing to indicate the advocacy would be immediately acted on. The wide divergence between advocacy and incitement, between preparational attempt, between assembling and conspiracy, must be borne in mind." (Emphasis supplied.)

59. 315 U.S. 568 (1942)—Conviction of a Jehovah's Witness for addressing the police officer as "a damned Fascist" upheld.

60. 337 U.S. 1 (1948)—Conviction of a speaker addressing a crowd and attacking "Communistic Zionist Jews" reversed.

61. 340 U.S. 315 (1951)—Conviction of a speaker for "endeavoring to arouse the Negro people against the Whites" and refusing to stop when requested by a police officer upheld. Justice Douglas, dissenting in *Feiner*, wrote "A speaker may not, of course, incite a riot any more than he may incite a breach of the peace by the use of 'fighting words'." 340 U.S. 329, 341.

62. 274 U.S. 357, 376 (1927).

In its most recent decision in the free speech area, the Supreme Court, while discrediting *Whitney v. California*, appears to have reaffirmed the distinction drawn by Justice Brandeis in his concurrence. Reversing the conviction of a Ku Klux Klan member who staged a "rally" for television reporters, the Court said:⁶³ —

"* * * the constitutional guarantees of free speech and free press do not permit a State to forbid or prescribe advocacy of the use of force or of law violation except *where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*" (Emphasis supplied.)

However hard it is in practice to draw the distinctions between advocacy and incitement, it is clear that in the definition of the crime, the Genocide Convention has drawn them correctly by these standards.

In short, the particular criticisms of the text of the Convention are the sort of objections that can be made to the text of many documents. Singly or together, they do not provide reason to reject the Convention.

63. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

V. THE GENOCIDE CONVENTION REMAINS AN ISSUE OF CURRENT IMPORTANCE

There may be some temptation to say of the Genocide Convention that it is "fighting the last war". It is, after all twenty years old, and it was stimulated by the atrocities of World War II. But both in political terms and in terms of the substance of the Convention, the issues are very current.

As the table at Appendix B shows, ratifications and accessions keep coming in all the time—Nepal was the latest in January of 1969. America's friends ask, "Where are you?"; America's foes say, "You see what we mean. . . ." ⁶⁴

More important, more tragic, is the fact that threats and acts of genocide are in no sense remote. In Africa, in the Middle East, Southeast Asia, in the Mediterranean, and the Caribbean, it is clear that ethnic hatreds, war with hunger and depredation as weapons, brain-washing and torture are not of the past. If the excesses of World War II have not quite been repeated, the Genocide Convention may have had a part to play. No one can say that the concerns of that treaty are not the concerns of today and tomorrow.

It may well be that the Genocide Convention has already been violated, even by those who have joined it. Magna Carta was violated many times in English history; the American Bill of Rights was violated many times—indeed continues to be violated all too often. So are the Fourteenth Amendment and the Fifteenth Amendment. But none could gainsay their importance, and their overall effectiveness.

It is too early to tell whether the Genocide Convention will take its place alongside Magna Carta and the Bill of Rights. It is too late to pretend it does not matter.

64. In June of 1969 the Economic and Social Council of the United Nations adopted a new resolution which invited all states which are parties to the Genocide Convention to transmit information regarding implementing measures, and calling upon states which have not yet become Parties to the Genocide Convention to do so as soon as possible. U.N. Doc. E/Res./1420/XLVI (June 17, 1969).

CONCLUSION

For the reasons stated, it is in the national interest of the United States to ratify the Genocide Convention. The American Bar Association is rightfully looked to by the nation and particularly by the Senate for leadership in this matter. Accordingly, the American Bar Association should adopt the Resolution submitted herewith by the Section of Individual Rights and Responsibilities in favor of ratification by the United States of the Genocide Convention.

Respectfully submitted,

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Chairman,

*Section of Individual Rights
and Responsibilities of the
American Bar Association*

(Genocide Convention, hearing, Committee on Foreign Relations, U.S. Senate, 92-1, March 10, 1971, pp. 147-185.)

[From the American Bar Association Journal, February 1972]

TIME TO ACT ON THE GENOCIDE CONVENTION

(By Arthur J. Goldberg and Richard N. Gardner)

(The Senate Foreign Relations Committee has reported favorably on the Genocide Convention, which now awaits action by the Senate. A major stumbling block to ratification has been the continuing opposition of the American Bar Association, although the Sections and the Committees of the Association concerned with the subject matter have recommended favorable action on the convention. The legal objections raised against ratification are without foundation or substance and are unpersuasive.)

It is now more than twenty-five years since the United Nations first took up the question of the prevention and punishment of the crime of Genocide. On December 11, 1946, the General Assembly unanimously adopted Resolution 94(1), which affirmed "that genocide is a crime under international law" and requested the Economic and Social Council to draft a genocide convention. Two years later, on December 9, 1948, by Resolution 260A(III) the General Assembly unanimously approved the text of the Convention on the Prevention and Punishment of the Crime of Genocide.

Seventy-five countries now have ratified the Genocide Convention. The United States is the most prominent U.N. member that has not. One reason for our country's failure to ratify—very possibly the principal reason—has been the opposition of the American Bar Association recorded in a decision of the House of Delegates on September 8, 1949.

Since 1949, however, sentiment within the Association has changed. At the Midyear Meeting of the House of Delegates on February 23, 1970, a proposal to reverse the 1949 position and to place the American Bar Association on record in favor of the Genocide Convention failed by a vote of 126 to 130. Still more significant, every Section and Committee of the Association having specialized competence in the subject matter has come out in support of ratification of the Genocide Convention during the last few years: the Section of Individual Rights and Responsibilities, the Section of International and Comparative Law, the Section of Criminal Law, the Section of Judicial Administration, the Section of Family Law, and the Standing Committee on World Order Under Law.

Ratification of the Genocide Convention also has been endorsed by a number of past Presidents of the Association, including Bernard G. Segal, William T. Gossett, Charles S. Rhyne and Witney North Seymour; by the Chairman of the Standing Committee on Federal Judiciary, Lawrence E. Walsh; by Solicitor General Erwin N. Griswold; and by many other leaders in the Association.

Two distinguished members of the Association, Eberhard P. Deutsch and Alfred J. Schweppé, however, appeared on behalf of the Association to testify in opposition to the Genocide Convention in hearings held before a Senate Foreign Relations Subcommittee on March 10, 1971, and presented the legal objections that have been raised against the convention.¹ Given the almost evenly divided vote in the House of Delegates and the support for the convention from relevant specialized Sections and Committees of the Association, we believe that it is appropriate to present the different viewpoints now existing in the Sections and Committees.

The authors of this article appeared at the Senate hearings on behalf of the Ad Hoc Committee on the Human Rights and Genocide Treaties (a committee of fifty-two national, civic, religious and labor organizations) and presented legal arguments in favor of the convention.²

The full Senate Foreign Relations Committee reported favorably on the convention by a vote of 10 to 4 and recommended that the Senate advise and consent to ratification. After carefully reviewing the arguments, the committee concluded:

We find no substantial merit in the arguments against the convention. Indeed, there is a note of fear behind most arguments—as if genocide were rampant in the United States and this Nation could not afford to have its actions examined by international organs—as if our Supreme Court would lose its collective mind and make of the treaty something it is not—as if we as a people don't trust ourselves and our society.³

REPORT OF SENATE PROVIDES AUTHORITATIVE REFUTATION

We believe the report of the Senate Foreign Relations Committee provides an authoritative refutation of the legal arguments opponents of the Genocide Convention have employed to justify their opposition for nearly a quarter of a century.

We present here a point-by-point rebuttal of the legal arguments against the convention, drawing from our testimony to the Foreign Relations Committee as well as the committee's own report, in the hope that it may clarify the legal issues and contribute to speedy and favorable action by the Senate.

1. The contention that the Constitution prevents ratification of the Genocide Convention because genocide is a "domestic" matter is without foundation.

In his testimony to the Foreign Relations Committee, Mr. Deutsch declared himself fully in agreement with the decision of the United States to vote in favor of the General Assembly resolution on genocide of December 11, 1946: "Standing foremost as a world leader in the protection of individual rights, she could do no less." But he added that "having joined in such a declaration as to a matter which lies, ultimately, within the domestic sphere of each of the world's nations, the United States has gone far enough" (Italics supplied). The italicized language is clearly incompatible with the statement in the General Assembly resolution that "genocide is a crime under international law". Mr. Deutsch's extensive quotations from Resolution 96(I) neglected to include this key provision.

Nowhere in his testimony did Mr. Deutsch explain his conclusion that genocide is a "domestic matter". His reasoning on this general issue may be found, however, in a report which he prepared in 1967 as chairman of the American Bar Association's standing Committee on Peace and Law Through United Nations. It is there stated that a convention deals with "domestic" matters when it deals "with the relation between a state and its own citizens".⁴ But this is not the relevant constitutional test.

As the Supreme Court declared in *Geofroy v. Riggs* 133 U.S. 258, 267 (1890), the treaty-making power may be exercised on any matter "which is properly the subject of negotiation with a foreign country". The United States is a party to numerous international agreements relating to the activities of its own citizens within the United States because those treaties nevertheless deal with matters appropriate for international negotiation. Examples include treaties on nar-

¹ *Hearings on the Genocide Convention Before a Subcomm. of the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 12-54 cited hereafter as 1971 *Hearings*. The testimony of Mr. Deutsch was virtually identical to his article with Orle L. Phillips, *Pitfalls of the Genocide Convention*, 56 A.B.A.J. 641 (1970).

² 1971 *Hearings* at 107-137.

³ Sen. Ex. Rep. No. 92-6, 92d Cong., 1st Sess. (1971), cited hereafter as Senate Report.

⁴ *Human Rights Conventions, Hearings Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess., Part 2, 70 (1967).

cotics,⁵ public health⁶ and nature conservation,⁷ and the Supplementary Convention on Slavery, which Mr. Deutsch initially opposed on the ground that it also dealt with "matters essentially within the domestic jurisdiction of the United States".⁸

In the words of the Special Committee of Lawyers of the President's Commission for the Observance of Human Rights Year, of which retired Supreme Court Justice Tom C. Clark was chairman: "Treaties which deal with the rights of individuals within their own countries as a matter of international concern may be a proper exercise of the treaty making power of the United States. . . . It may seem almost anachronistic that this question continues to be raised."⁹

What is "properly the subject of negotiation with a foreign country" and, therefore, a valid subject of a treaty is something the Senate has an obligation to determine in each case. We do not take the position that the executive branch can make any matter "international" by putting it in a treaty. But the question should be determined objectively in the light of the current interests of the United States in an interdependent world and contemporary concepts of international law—not on the basis of notions that may have been appropriate to a different historical era.

By any objective standard, genocide is a matter of international concern and is, therefore, an appropriate subject for the exercise of the treaty-making power. In our shrinking world the massive destruction of a racial, religious or national group in one country has its impact on members of this group in other countries, stimulates demands for intervention and inevitably troubles international relations. The fact that the United Nations General Assembly unanimously declared genocide to be a crime under international law in 1949 and that seventy-five members of the United Nations are parties to the Genocide Convention (including, to name just a few, such democracies as the United Kingdom, Canada, France, Mexico and the Scandinavian countries) is further evidence that genocide can no longer be considered a matter wholly within domestic jurisdiction. As was said by the Senate Foreign Relations Committee: "On both moral and practical grounds, the commission of genocide, involving as it must mass action, cannot help but be of concern to the community of nations."

2. The contention that the Genocide Convention would alter the balance of authority between the states and the Federal Government is unfounded.¹⁰

The Constitution by Article I, Section 8, specifically gives Congress the power to "define and punish . . . offenses against the law of Nations." Genocide is an offense against the law of nations and is thus within the power of Congress to outlaw. Moreover, the power of the Federal Government in this field has been confirmed in the Civil Rights Acts of 1957 and 1964 and the Voting Rights Act of 1965. The Association's Section on Individual Rights and Responsibilities said in its report: "Ratification of the convention will add no powers to those the Federal Government already possesses."

3. The contention that ratification of the Genocide Convention would subject American citizens to trial in foreign countries like North Vietnam on trumped-up charges of genocide is wholly false.¹¹

There is nothing in the Genocide Convention that would provide warrant for charges by North Vietnam that our prisoners of war, being held under conditions in violation of the Geneva Convention, are guilty of genocide. This is a matter of great concern to the authors and, of course, many Americans regardless of their views about the war in Vietnam. As the Senate Foreign Relations Committee

⁵ 1912 Convention Relating to the Suppression of the Abuse of Opium and Other Drugs (T. S. 612); 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (T. S. 863); 1953 Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of the International and Wholesale Trade In, and Use of Opium (T.I.A.S. 5273).

⁶ World Health Organization Regulations No. 1 (T.I.A.S. 3482), as amended (T.I.A.S. 3482 and 4409), and World Health Organization Regulations No. 2 (T.I.A.S. 3625), as amended (T.I.A.S. 5156, 4420, 4823, 4896, 5459 and 5863).

⁷ 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (T. S. 981).

⁸ *Human Rights Conventions and Recommendations*, Draft of Proposed Report for Consideration by Section and Committee, April, 1967.

⁹ For another example of confusion as to the relevant constitutional test, see Raymond, *Don't Ratify the Human Rights Conventions*, 54 A.B.A.J. 141 (1968). Mr. Raymond, evidently unaware of the treaty cited in note 7, takes the view that the United States can make treaties on the protection of wildlife only when birds fly from one country to another.

¹⁰ This contention appears in the appendix to Mr. Schweppe's statement to the Senate subcommittee, 1971 *Hearings* at 71, although it is not in Mr. Deutsch's testimony.

¹¹ This contention appears in the testimony of Mr. Deutsch, 1971 *Hearings* at 20, 37-39.

pointed out in its report, however, Hanoi can make trumped-up charges of genocide against our servicemen who fall into their hands with or without reference to the Genocide Convention. In the words of the committee: "It is reality that American prisoners of war in North Vietnam could now be charged by the Hanoi government for war crimes or genocidal acts on whatever trumped-up charges Hanoi wishes to make. Their peril will not be increased by approval of this convention while peril may be avoided for tens of millions by ratification of the convention."

As to the possibility of extraditing Americans from the United States to North Vietnam or other countries for acts of genocide allegedly having occurred there, it should be remembered that under the Genocide Convention, extradition would take place only in accordance with laws and treaties in force. We have no extradition treaties with North Vietnam. Nor do we make such treaties with countries whose legal systems do not afford basic procedural safeguards. We do not grant extradition in any event unless a *prima facie* case is established against the accused and unless the accused will be afforded by the requesting state the due process provided by our own law.

Finally, the Genocide Convention, in accordance with an agreed interpretation of Article VI which is contained in the relevant U.N. committee report, "does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State".¹² The Foreign Relations Committee expressed itself as fully satisfied on this point but recommended an understanding to this effect to remove any possible uncertainty. The Nixon Administration has further indicated that any agreements we make covering genocide will assert the right of the United States to refuse to extradite an accused if he is standing trial in the United States or if our Government elects to try him itself.¹³

4. The argument that ratification of the Genocide Convention would subject the United States to irresponsible charges of genocide arising out of Vietnam, our treatment of American blacks or other situations is without foundation.¹⁴

Here again, ratification of the Genocide Convention does not alter the present situation to our disadvantage. Even in the absence of our ratification, there is nothing to prevent a country from making baseless charges of genocide against this country in the U.N. If anything, ratification would improve our position, because the convention requires an "intent to destroy, in whole or part, a national, ethnical, racial or religious group as such".

The tragic events in Vietnam and the terrible loss of life, both military and civilian, that has occurred there do not meet this definition, whatever other domestic legal consequences may flow from allegedly illegal acts there. The treatment of the black community in the United States, which admittedly has suffered widespread discrimination for many years, also does not fall within the definition. In both cases the necessary intent to destroy a racial or ethnic group as such is missing.

As the Senate report indicates, ratification of the convention would, if anything, help us rebut these charges by subjecting our behavior to a precise legal definition of genocide.

5. The argument that provision for the settlement of disputes by the International Court of Justice would override the Connally Amendment and unreasonably limit our sovereignty is without substance.¹⁵

The Connally Amendment applies only to our acceptance of Article 36(2) of the court's statute, the so-called optional clause providing for compulsory jurisdiction across the board. Cases arising as a result of our adherence to the Genocide Convention would fall under Article 36(1) of the court's statute, which covers the court's jurisdiction as provided for in specific treaties. The United States has ratified many treaties containing the same type of provision for the settlement of disputes by the International Court of Justice as is contained in the Genocide Convention. Among these treaties are the Supplementary Convention on Slavery, the Antarctic Treaty, the Statute of the International Atomic Energy, and the Convention on the Privileges and Immunities of the United Nations ratified in 1970.

¹² See Robinson, *The Genocide Convention—A Commentary* S3-S4 (World Jewish Congress, 1960), containing citations to the drafting history on this point.

¹³ *Genocide Convention, Hearings Before a Subcomm. of the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess. 45-46 (1970), testimony of George Aldrich, Deputy Legal Adviser, Department of State.

¹⁴ This argument is made by Mr. Deutsch, 1971 *Hearings* at 18, 31-33.

¹⁵ This argument is made by Mr. Deutsch, 1971 *Hearings* at 22, 46.

This provision for the settlement of disputes over the interpretation of the Genocide Convention does not unreasonably limit our sovereignty. Our interests are better served by having any charges of genocide against us considered in a judicial forum like the International Court of Justice than in more politically motivated forums. Of course, by this provision we do undertake a commitment to subject ourselves to third-party judgment in a limited sphere, as do the other parties to the convention. This exchange of commitments may be found in many treaties to which we have become a party. Where the exchange of commitments serves our national interest, as it does here, it provides no valid basis for objecting to the treaty.

It should be noted that the Soviet Union and other countries have ratified the convention subject to a reservation that they do not accept compulsory reference to the International Court of Justice. As a result, the United States will be in a position to invoke these countries' reservations in its own behalf to defeat the court's jurisdiction if a case charging genocide should be brought against us by those countries.

6. The argument that various provisions in the convention—"in whole or in part", "mental harm", "direct and public incitement to commit Genocide"—are loosely drafted and potentially harmful to our interests is without foundation.

Words in a statute or treaty are not self-interpreting. They must be read in the context of other provisions and in the light of the legislative or drafting history. The hypothetical interpretations of the Genocide Convention advanced by the critics are invalidated by the language of the convention itself and by the records of the negotiation.

Thus, "in whole or in part" does not mean that the killing of a single individual, profoundly deplorable as any killing is, becomes genocide.¹⁶ As the negotiating history makes clear, substantial numbers must be involved, and for the definition of genocide to be satisfied the acts of homicide must be joined by a common intent to destroy the group. The understanding recommended by the Foreign Relations Committee to confirm this point is wholly consistent with the drafting history.¹⁷

"Mental harm", in turn, would not support propaganda charges of harassment of minority groups, as charged by some critics,¹⁸ because mental harm becomes an element of genocide only when done with an intent to destroy a group. Moreover, as the negotiating history shows, this provision was inserted for the narrow purpose of prohibiting the permanent impairment of mental facilities, as through the forcible application of narcotic drugs. Once again, the understanding recommended by the Foreign Relations Committee is wholly consistent with the drafting history.

"Direct and public incitement to commit genocide does not cover constitutionally protected speech." It covers incitement which calls for the commission of mass murder, which is actionable under our Constitution as in other countries. As the Supreme Court declared in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action*" (emphasis is added). In any case as was stated in *Reid v. Covert*, 354 U.S. 1 (1957), no treaty can override a provision of the Constitution, and there is no doubt that the legislation passed in implementing the Genocide Convention must be interpreted in accordance with the First Amendment.

7. The contention that ratification of the Genocide Convention would subject American citizens to trial before an international penal tribunal is without foundation.¹⁹

Article VI of the convention provides that persons charged with genocide shall be tried "by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction". This part of Article VI, perhaps regrettably, is a dead letter. No such international penal tribunal has been established, and there is no negotiation under way to create one. If such a tribunal were established, action by the Senate would be

¹⁶ This claim was made by Mr. Schweppe, 1971 *Hearings* at 61.

¹⁷ 1971 Senate Report at 1, 6, 18. Robinson, *supra* note 11 at 63.

¹⁸ Mr. Deutsch, 1971 *Hearings* at 18-19, 33-34.

¹⁹ As charged by Mr. Deutsch, 1971 *Hearings* at 45.

²⁰ This contention is made by Mr. Deutsch, 1971 *Hearings* at 21, 40-45.

required, either in the form of advice and consent to ratification of a treaty or action on legislation, before the United States could accept its jurisdiction.

Finally, it should be underlined that the International Court of Justice has no criminal or penal jurisdiction and considers only cases involving states, not individuals.²¹

8. The argument that the convention does not define genocide as having been committed "with the complicity of government" is no objection to ratification.²²

The convention is directed at "persons" whether they are "constitutionally responsible rulers, public officials or private individuals." Each government is committed under the convention to punish such persons. There is no reason why such individuals should not be held responsible for genocidal act, even without government complicity.

9. The argument that the Genocide Convention abolishes the defense of "superior orders" is without foundation.²³

The convention says nothing about a possible defense of "superior orders"; but it is significant that the convention includes "intent" as an element of the crime of genocide. An authoritative review of the drafting history on this point summarizes the matter as follows:

"Ordinarily it would seem that no intent could be ascribed to persons merely fulfilling superior orders; intent implies initiative. However, superior orders would not be a justification in such cases where the guilty party was not only a tool of his superiors but participated in the 'conspiracy to commit genocide.' Guilt could likewise be established in a case where, although acting under orders, the person was in a position to use his own initiative and thus act with the intent to destroy the group. The non-inclusion of a proviso relating to superior orders thus leaves the tribunals applying the Convention the freedom of interpreting it in accordance with the domestic legislation and the specific circumstances of the case."²⁴

10. The argument that the omission of "political" groups makes the Genocide Convention worthless is unpersuasive.²⁵

It is inconsistent for those who criticize the convention on the grounds that it subjects the United States to too much interference in its domestic affairs to complain at the same time that it fails to cover "political groups". In any event, the absence of one kind of group from the convention is no reason not to protect the groups that are covered.

RATIFICATION OF THE CONVENTION WOULD BE IN OUR BEST INTERESTS

We find the objections against ratification of the Genocide Convention to be without substance. The arguments in favor of ratification, on the other hand, seem to us compelling.

Our adherence to the Genocide Convention can make a practical contribution to the long and difficult process of building a structure of international law based on principles of human dignity. It will put us in a better position to protest acts of genocide in other parts of the world and will enhance our influence in United Nations efforts to draft satisfactory human rights principles.

We do not say that our adherence to this convention will work miracles. It may not bring very dramatic benefits in the short run. Let us remember, however, that none of the great documents of human civilization produced instant morality—not even Magna Carta or our own Bill of Rights. The point is that they did shape history in the long run. We believe the same may be true of the Genocide Convention, if we only give it a chance.

GENOCIDE CONVENTION OUTLAWES REPUGNANT ACTION

The Genocide Convention outlaws action that is repugnant to the American people and to our constitutional philosophy. We should not decline to affirm our support for principles of international law and morality in which we believe. Our country was founded on a passionate concern for human liberty reflected

²¹ One of the exhibits submitted by Mr. Deutsch stated incorrectly that under the Genocide Convention the "U. N. World Court" would "hear cases of alleged incidents of physical or mental 'genocide' committed by individuals. . . . The accused in such cases would not be protected by the Bill of Rights." 1971 *Hearings* at 50.

²² This argument is advanced by Mr. Deutsch, 1971 *Hearings* at 17-18, 30-31.

²³ This argument is made by Mr. Deutsch, 1971 *Hearings* at 39-40.

²⁴ Robinson, *supra* note 11 at 72-73.

²⁵ This argument is made by Mr. Deutsch, 1971 *Hearings* at 19, 33-35.

by the Bill of Rights and the Constitution. We believe that concern is very much alive today, as is reflected by the report of the Foreign Relations Committee supporting the convention. It is inconceivable that we should hesitate any longer in making an international commitment against mass murder. At a time when our commitment to human rights is being questioned by some of our own people and by others overseas, it is particularly important that we ratify a treaty so thoroughly consistent with our national purpose.

(Genocide Convention, hearing before the Committee on Foreign Relations, U.S. Senate, 97th Congress, 1st Session, December 3, 1981, pp. 72-78.)

ANALYSIS OF RESERVATIONS AND UNDERSTANDINGS EXPRESSED BY RATIFYING STATES OF GENOCIDE CONVENTION

[Supplied by Department of State]

Senator Stone requested an analysis of the reservations or understandings expressed by ratifying states with respect to four subjects: (a) the World Court; (b) extradition; (c) mental harm; and (d) the definition of genocide, particularly the meaning of "substantial segment" of a national, ethnic, racial or religious group.

(a) The Genocide Convention has been ratified or adhered to by 83 states, of which 21 have entered reservations or understandings. The full texts of these reservations and understandings, along with the objections that have been raised against certain of them by other parties, have been submitted for the record.

With respect to the World Court, 19 of the 83 parties have entered a reservation to Article IX which provides that disputes between the parties relating to interpretation, application or fulfillment of the Convention, including disputes relating to the responsibility of a state for genocide or for any of the acts enumerated in Article III of the Convention, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Reservations to Article IX were entered by Albania, Algeria, Argentina, Bulgaria, Byelorussia, Czechoslovakia, the German Democratic Republic, Hungary, India, Mongolia, Morocco, the Philippines, Poland, Romania, Rwanda, Spain, the Ukraine, the Soviet Union, and Venezuela.

Most of the reservations to Article IX, including those of the Communist states, specifically require the agreement of all the parties to a dispute for its submission to the International Court. This reflects the general policy of these states not to submit to the jurisdiction of the Court. Algeria, India, Morocco, the Philippines and Venezuela have also taken this approach. Argentina's reservation to Article IX applies only to its "territories," a reference to the disputed Falkland Islands. Rwanda and Spain have reserved completely to Article IX.

Objections to some or all of these Article IX reservations were entered by Australia, Belgium, Brazil, the Republic of China, Cuba, Ecuador, Greece, the Netherlands, Norway, the Republic of South Viet-Nam, Sri Lanka, and the United Kingdom. The objections of the Republic of China and the Netherlands specifically state that these countries do not regard the reserving states as parties to the Convention. It is not clear from the record whether the other objecting states regard the reserving states as parties.

The United Kingdom, in a communication to the U.N. Secretary-General dated 21 November 1975 said that:

"The Government of the United Kingdom of Great Britain and Northern Ireland have consistently stated that they are unable to accept reservations in respect of Article IX of the said Convention; in their view this is not the kind of reservation which intending parties to the Convention have the right to make."

In our judgment, the reservations to Article IX of the Convention are unsound. The United States is a party to many treaties which require submission of disputes regarding interpretation or application to the International Court of Justice at the request of any of the parties to such disputes. The Senate has not attached a reservation to any of these agreements, which we believe is a sound approach. We are gratified that 64 parties to the Genocide Convention have no reservations or understandings concerning Article IX.

(b) Concerning extradition, 2 of the 83 parties have entered statements. The Philippines stated upon ratification that it "does not undertake to give effect to [Article VII of the Convention] until the Congress of the Philippines has enacted the necessary legislation defining and punishing the crime of genocide, which legislation, under the Constitution of the Philippines, cannot have any retroactive effect."

Venezuela entered a reservation stating that "with reference to Article VII, notice is given that the laws in force in Venezuela do not permit the extradition of Venezuelan nationals."

Objections to the Philippines statement on Article VII were made by Brazil, Greece, Norway, South Viet-Nam, and the United Kingdom. Objections to the Venezuelan reservation to Article VII were made by the same countries except Brazil.

In view of the fact that only two of the 83 parties have entered reservations on the question of extradition, extradition under the Convention seems not to be a troubling or difficult issue for most states. The third understanding attached by the Senate Foreign Relations Committee to the proposed resolution of ratification, and Section 3 of the proposed implementing legislation, will protect the interests of the United States and its nationals with respect to extradition.

(c) and (d) None of the 83 parties entered reservations, understandings, or other statements regarding mental harm, "substantial segment," or the definition of genocide. United States interests with respect to these matters would be protected by the first and second understandings of the proposed resolution of ratification, and by the terms of the proposed implementing legislation.

(Genocide Convention, hearings, Committee on Foreign Relations, U.S. Senate, 95-1, May 24 and 26, 1977, pp. 37-38.)

PREPARED STATEMENT OF HERBERT J. HANSELL, LEGAL ADVISER, DEPARTMENT OF STATE

Mr. Chairman and members of the committee: I am very grateful for this opportunity to testify in support of the Convention on the Prevention and Punishment of the Crime of Genocide, or "Genocide Convention," as it is generally known. In coordination with the testimony by Deputy Secretary Christopher, I should like to focus on some questions that have been raised about the Convention, and various legal criticisms that have been directed against it.

Perhaps most fundamentally, it has been argued that genocide is not a proper subject for treaty making, and is essentially a subject within the domestic jurisdiction of states. But I believe it is generally accepted, Mr. Chairman, that genocide is a proper subject for the treaty power. As this committee pointed out in its most recent report on the Convention, some 83 nations are now a party to this Convention, and clearly these nations believe genocide is properly a subject of international concern. In addition, the United States is a party to other human rights treaties, including those on slavery and refugees. Most recently the Senate approved by 88-0 two treaties on the political rights of women. The day is past when it could be seriously contended that human rights are not appropriately the subject of international agreements. As President Carter said in his speech to the United Nations two months ago:

All the signatories of the UN Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of its citizens is solely its own business.

It has also been charged that certain of the key terms of the Convention are vague. But the understandings which are attached by the Committee to the resolution of ratification that this committee has previously proposed, and also the draft implementing legislation, are both designed to define more precisely the meaning of such terms as "mental harm," and the phrase "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such."

It has been said that the proscription in Article III of the Convention against direct and public incitement to commit genocide is a restriction on free speech. But direct and public incitement to crime is not protected by the constitutional guarantee of free speech. As this Committee heard in 1970 from William Rehnquist, now Associate Justice of the Supreme Court and at that time an Assistant Attorney General, the constitutional guarantee of free speech would not be and could not be adversely affected in any way by the terms of the Convention. In 1959, in the case of *Brandenburg v. Ohio*, 395 U.S. 414, the Supreme Court reaffirmed that even advocacy of force is protected unless it is directed to inciting lawless action and is likely to produce it.

It has also been asked whether state law will be overridden by the terms of the Convention. However, nothing in the Convention overrides state law. The proposed implementing legislation, if enacted, would expressly clarify that Congress does not intend to occupy the field, and would confirm that state laws not inconsistent with the legislation are not invalidated.

Question has been raised as to whether the Convention will enlarge the powers of the Congress. Once again, neither the Convention nor the implementing legislation contain any provisions which could have such an effect. Certainly the Congress can legislate the crime of genocide even without the Convention. Under Article I, § 8, clause 10 of the Constitution, the Congress is empowered "to define and punish offenses against the law of nations." Approval of the Convention will require the Congress to exercise powers it already possesses, but does not enlarge those powers.

It has been suggested that if the United States adheres to the Convention, we will be confronted with spurious charges of genocide arising out of racial and religious discrimination; it also has been asked whether war-time combat might

result in charges of genocide made by our opponents. Mr. Chairman, loose charges of genocide are not valid under the terms of the Convention, which requires the intent to destroy an entire group. This is a critical and essential element. The requirement of intent to destroy a group as such distinguishes killing or wounding in combat from genocide.

There has also been some discussion about possible use of international tribunals to punish defendants. It has been said that the International Court of Justice, referred to in Article IX of the Convention, would become a forum for trial. But of course neither the International Court nor any other international tribunal has criminal jurisdiction and no such trial is possible.

As for the international penal tribunal referred to in Article VI of the Convention, the United States has no obligation to become a party to the statute of any such tribunal should it ever be established. For the United States to accept the jurisdiction of an international penal tribunal, an exercise of the treaty power would be required, and the advice and consent of the Senate by a two-thirds vote would be necessary.

I want to address the question of extradition, in view of some complexities involved and in order to allay any misunderstandings. Article VII of the Convention provides that the parties pledge to grant extradition of persons charged with genocide "in accordance with their laws and treaties in force" and provides that there is no defense to extradition on the ground that genocide may be a "political" crime.

Concern has been expressed that American citizens could be extradited for trial in foreign countries where the legal system does not provide for the kinds of guarantees to criminal defendants available in the United States. There are several points to be made in response.

First, U.S. law provides for extradition only where there is an extradition treaty in force which covers the crime in question, but the Genocide Convention is not an extradition treaty. The Convention simply contemplates that the crime of genocide will be added to the list of crimes for which Americans will be extraditable under any new extradition treaties we might conclude, or in any existing extradition treaties we may revise. At the present time, genocide is not listed as an extraditable offense in any of our extradition treaties.

Second, the United States does not negotiate extradition treaties with nations which do not permit defendants a fair trial. The possibility of a fair trial, even though the standards cannot be expected to match ours in every detail, is always a factor taken into account in deciding whether to negotiate an extradition treaty.

In addition, since these treaties may remain in force for many years, during which time the judicial system of the foreign country may change, certain procedural safeguards are built into our extradition treaties. Such treaties require that the state requesting extradition must produce evidence of the crime sufficient to persuade a U.S. Court and the executive branch that the person whose extradition is requested would also be held for trial in the United States had the alleged crime been committed in this country.

Further, our extradition treaties provide that extradition will not be granted if the person sought has already had a trial or is undergoing a trial in the United States for the same act.

Article VI of the Convention provides that persons charged with genocide are to be tried by a competent tribunal of the State in the territory in which the act was committed. But the negotiating history of the Convention makes it abundantly clear that trial may also occur in the country of which the defendant is a national. The third understanding attached by the Committee to the proposed resolution of ratification makes this point as well, and it is further spelled out in the implementing legislation.

Moreover, Section 3 of the draft implementing legislation sets forth the sense of the Congress that the Secretary of State, in negotiating extradition treaties, is to reserve for the United States the right to refuse extradition of a U.S. national to a foreign country to stand trial on a charge of genocide if the United States intends to exercise jurisdiction in the case, or the defendant has been or is being prosecuted for the offense in the United States. In brief, the United States may always elect to try a U.S. national and thus refuse extradition, no matter where the alleged crime had been committed.

Mr. Chairman, there is one very positive legal aspect of this matter that I believe has not received the attention it deserves, and that is the place of the Genocide Convention in the development of an emerging concept of international

crimes, a concept that serves the interests of the United States and the world community. As you know, we are a party to a number of criminal law treaties, including the laws of war conventions, the treaties on aircraft hijacking and sabotage, the convention on the protection of diplomats, and treaties on narcotics trade, oil pollution, and others. Piracy has long been prohibited by international criminal law. We have also introduced at the United Nations a treaty on terrorism. And of course, these criminal law treaties to which we are a party, like the Genocide Convention and piracy charges, rely on our court system for their enforcement.

In brief, we are a party to and we are in the process of developing a body of international criminal law that is important to the United States and to a peaceful world order. The Genocide Convention is one of the missing pieces in U.S. adherence to such a pattern of international criminal standards, and it is my hope that this situation will be corrected. As this Committee stated in its 1976 report on the Genocide Convention, what is really at issue is an attempt of a civilized society to curb the excesses of mankind and to set a higher standard of international morality.

That ends my prepared remarks, Mr. Chairman, and I would be happy to respond to any questions you or the members of the Committee may have.

(Genocide Convention, hearings, Committee on Foreign Relations, U.S. Senate, 95-1, May 24 and 26, 1977, pp. 26-28.)

PREPARED STATEMENT OF BRUNO V. BITKER, CHAIRMAN, COMMITTEE ON INTERNATIONAL HUMAN RIGHTS, SECTION ON INTERNATIONAL LAW, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee, my name is Bruno Bitker and I am chairman of the American Bar Association's Committee on International Human Rights of the Section on International Law. I am honored to appear before you today on behalf of the American Bar Association to urge the Senate to give its advice and consent to ratification of the Genocide Convention. I have appeared before this Committee at prior hearings, conveying the support of a variety of organizations. I am, however, especially delighted to do so this time on behalf of the ABA, which represents the organized bar of this country. The American Bar Association, as this Committee is aware, did not easily or quickly arrive at its endorsement of the Genocide Convention. In fact, in 1949, prior to the hearings conducted by this Committee, it had decided not to support ratification because the treaty "involves important constitutional questions . . ." not satisfactorily resolved. Subsequently, in 1970, following President Nixon's request to the Senate to act on the Genocide Convention, the ABA again considered the question. But by a divided vote of 130 to 126 in the House of Delegates, it declined to change its earlier stand. Opponents of ratification had frequently cited the ABA position as justifying U.S. inaction. However, upon further study and consideration, in February, 1976, the ABA reversed its position and by an overwhelming vote recommended the ratification of the Convention. A copy of that recommendation and the supporting report is filed with this statement.

¹ S. Exec. Report No. 93-5, 93rd Congress, 1st Sess., (1973).

Though considerable attention was given to this Convention by the bar association before it decided to support it, it does not match the extensive and thorough analysis of every provision accorded to it by this Committee since President Truman, on June 10, 1949, sought the advice and consent of the Senate to ratification. The published hearings of the subcommittee held in January and February, 1950, contain about everything that could be said on the subject, pro and con. The opposition feared that it might undermine our constitutional structure. On the other hand, the favorable testimony was so meaty, it would be difficult to single out specific references. However, if any Senator or staff member wishes to read the supporting testimony of just one witness, I would suggest the remarkable presentation by Philip B. Perlman, Solicitor General of the United States (p. 22, et seq.).

On May 23, 1950, the subcommittee reported out the Convention favorably with one declaration and four understandings (summarized in *Legislative History of the Committee on Foreign Relations, S. Doc. No. 247, 81st Cong., 2d Sess. at p. 27, 1950*). The full committee, however, withheld action and for almost two decades it remained in the Senate's deep freeze. Today it is eligible for a place in the Guinness Book of World Records as being the oldest treaty pending before the Senate (U.S. Senate, *Legislative Calendar, 95th Congress, March 31, 1977*).

Although the Senate had taken no further action following the 1950 hearings, in July, 1963, President Kennedy sent to the Senate three human rights treaties (Political Rights of Women, Abolition of Forced Labor, and a Supplementary Slavery Convention). In the course of the hearings on these conventions in 1967, action on the Genocide Convention was urged. However, no action was taken on it.

In 1968, the year designated by the United Nations as Human Rights Year in honor of the 20th anniversary of the adoption of the International Declaration of Human Rights, the President created a President's Commission for the Observance of Human Rights Year. The Commission urged ratification of the Convention. More particularly, it created a special committee of lawyers headed by Supreme Court Justice Tom C. Clark (retired), which included some of the most prominent lawyers in the country. That committee, on which I was privileged to serve, issued a report on the treaty-making power of the United States in human rights matters. Justice Clark, in his letter of transmittal, said in part:

"... I would like to reiterate here, however, our finding, after a thorough review of judicial, congressional and diplomatic precedents, that human rights are matters of international concern; and that the President, with the United States Senate concurring, may, on behalf of the United States, under the treaty power of the Constitution, ratify or adhere to any international human rights convention that does not contravene a specific Constitutional prohibition."

In its conclusion, the report said:

"... It may seem almost anachronistic that this question continues to be raised. It is nearly a quarter of a century since this country used the treaty power to become a party to the U.N. Charter, one of whose basic purposes is the promotion of human rights for all. The list of parties to the various human rights treaties proposed by the U.N. has become longer each year. In each of the last two years the U.S. Senate has approved a human rights treaty without a single dissenting vote. In December, 1968, the Chief Justice of the United States noted that we as a nation should have been the first to ratify the Genocide Convention and the Race Discrimination Convention. And yet the suggestion persists that this Nation is constitutionally impotent to do what we and the rest of the world have, in fact, been doing."

This report will be of value to members of this Committee and to the staff that drafts your report, and because it is now out of print, I ask consent to file my copy as a part of the record of these hearings.

Two other reports prepared by entities of the American Bar Association in support of ratification appear in the printed hearings of the subcommittee held March 10, 1971. One, at page 147, is the report of the ABA Section on Individual Rights and Responsibilities and the other, at page 196, is the report of the ABA Standing Committee on World Order Under Law. I participated in the drafting of the several reports to which I have alluded in this statement.

In February, 1970, President Nixon reminded the Senate that the Convention continued to be unfinished business and urged prompt action. Thereafter, new hearings were held in April and May, 1970, and again in March, 1971. The Committee reported out the Convention favorably on December 8, 1970, on May 4, 1971, on March 6, 1973 and again on April 29, 1976.

There is no better or more succinct review of the status of the Convention than as set forth in the Committee's 1976 report. That report includes three understandings and one declaration, which are also included in the ABA's resolution of approval. Attached to the Committee's report is the implementing legislation proposed in accordance with Article V of the Convention. I see no problem concerning this legislation and I understand none has been suggested.

Everything that can be said on the constitutional question has been fully discussed in all these hearings and Committee reports. To save time and to avoid unnecessary repetition, I am not repeating these legal arguments. It is difficult to take seriously any basic constitutional objection to the Convention. It is conceivable, though it has not been urged, that there are public policy objections to ratification. But it would be hiding behind a false front to fail to ratify on spurious constitutional grounds.

As noted in the Committee's last report, no fewer than 82 members of the United Nations (perhaps 83 depending on how China's accession is viewed) have become parties to the Convention. Although the United States was a leader in drafting and securing its adoption in the United States in 1948, it is the outstanding laggard in ratifying it. Its failure to ratify borders on constituting a national disgrace. As the late Chief Justice Earl Warren said in December, 1968, "We as a nation should have been the first to ratify the Genocide Convention . . . Instead we may well be the last . . ."

Since the Committee's 1976 report, a new President of the United States has come into office. President Carter has followed all of his predecessors from Truman through Eisenhower, Kennedy, Johnson, Nixon and Ford in support of America's furthering the cause of international human rights, including ratifying the Genocide Convention. As President Carter stated on March 17th to the United Nations: "Ours is a commitment, and not just a political posture . . . To demonstrate this commitment . . . I will work closely with our own Congress in seeking to support the ratification . . . of the United Nations Genocide Convention."

The legal obligation with respect to human rights is thus noted by Phillip C. Jessup, former member of the International Court of Justice:

"It is already law at least for members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties."

Certainly nothing is more basic to this obligation which the United States assumed when it ratified the U.N. Charter, than to outlaw mass murder of a national, ethnic, racial or religious group, as such, whether committed in time of peace or war.

I have especially referred in this statement to the endless hearings through which this Committee has sat to emphasize the need to fish or cut bait. The Committee has certainly exhibited great courtesy as well as extreme patience over the years in allowing anyone and everyone to express his or her views on the subject. As it said in 1976, "further hearings on the treaty were not warranted in view of the voluminous record made in hearings in 1950, 1970 and 1971." There appears no provision in the Convention that would support a successful attack on constitutional grounds. No objections asserted on a legal basis justifies delaying ratification. Any conceivable uncertainty as to a few phrases has been cured by the understandings. If there are justifiable reasons of national policy for not ratifying, they have not been advanced. The one new fact to be noted since the last hearing is the favorable action of the American Bar Association. And that has now been recorded.

Each time the Committee has acted it has reported the Convention favorably. But each time it has reached the Senate floor, an actual or threatened filibuster has prevented the Senate from voting to support a commitment we made on December 9, 1948, when we approved the treaty in the United Nations. It is already past the time to sign on the dotted line.

The United States is now reestablishing its moral leadership in the world. If it now ratifies this Convention, it would be a clear demonstration that it is faithful to its pledge under the U.N. Charter. It would also be acting in its own best national interest.

4. That the U.S. Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in article V has been enacted, be it for the

Resolved, That the President of the American Bar Association or his designee is hereby authorized to present the views of the Association as herein expressed

before the appropriate committees of the Congress and other agencies of the Government of the United States.

REPORT²

Summary of provisions of the convention

Article I

Genocide is a crime under international law, whether committed during peace or war.

The contracting parties undertake to prevent and punish such a crime.

Article II

Acts constituting Genocide are those committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" by:

- (a) "Killing members of the group";
- (b) "Causing serious bodily or mental harm to members of the group";
- (c) "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part";
- (d) "Imposing measures intended to prevent births within the group";
- (e) "Forcibly transferring children of the group to another group."

Article III

Acts which are punishable are:

- (a) Genocide
- (b) Conspiracy to commit Genocide
- (c) Direct and public incitement to commit Genocide
- (d) Attempt to commit Genocide
- (e) Complicity in Genocide.

Article IV

Persons committing Genocide shall be punished, whether constitutionally responsible rulers, public officials or private individuals.

Article V

The contracting parties shall enact the necessary implementing legislation to enforce provisions of the Convention.

Article VI

Persons charged with a violation of the Convention are to be tried by a competent tribunal in the state where the act was committed or by an international penal tribunal having jurisdiction of the parties.

Article VII

For the purposes of extradition Genocide is not to be considered a political crime. Extradition shall be granted by the contracting parties in accordance to their laws and treaties in force.

Article VIII

Any contracting party may call upon the competent organ of the United Nations for action where appropriate to carry out the purport of the Convention.

Article IX

Disputes relating to "interpretation, application or fulfillment" of provisions of the Convention including those relating to the responsibility of a state for Genocide or other acts punishable by the Convention shall be submitted to the International Court of Justice at the request of the disputing parties.

DISCUSSION

The purpose of the Convention is to make Genocide an international crime whether committed during peace or war. It seeks to prevent and punish when

² In preparation of this report the Section considered the testimony presented at the Hearings on Genocide before the Subcommittee of the Senate Committee on Foreign Relations in 1950, the Senate Committee's Report of Dec. 8, 1970, Mar. 4, 1971, and Mar. 6, 1973 as well as previous reports of other sections and committees of the American Bar Association and other pertinent material including a Report in Support Of The Treaty Making Power of the United States in Human Rights Matters prepared by the Special Committee of Lawyers of the President's Commission for the Observance of Human Rights Year 1969. (See app. 18, House Foreign Affairs Subcommittee Hearings August-December 1973).

It occurs the destruction, in whole or in part, of a national, ethnical, racial or religious group as such. The Convention defines Genocide, specifies the acts which constitute Genocide, sets forth the obligations of the parties, the place of trial of the accused, and provides for submission of disputes relating to interpretation, application or fulfillment to the International Court of Justice.

The first Understanding makes it clear that where the words "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" are used in the definition of the crime of Genocide that it means an *intent* to destroy by such acts in such a way as to affect a "substantial" part of the group concerned.

The second Understanding states that where the word "mental harm" is used to define a punishable act, it means a "permanent impairment of mental faculties." It does not include violent expressions of prejudice against individual members of groups. It also would discourage any frivolous allegations of mental harm.

The third Understanding is to take care of the situation where a national of the United States committed an act outside of the state. Pursuant to this understanding the U.S. will have the right to bring to trial before its own tribunals any of its nationals for acts committed. There has been considerable discussion regarding the Convention from the viewpoint of extradition. It should be understood that the Convention itself is not an extradition treaty.

The Convention is not self-executing but requires necessary implementing legislation. The recommended Declaration makes it clear that we must enact necessary federal legislation pursuant to our constitutional procedure prior to depositing our instrument of ratification.

Attached hereto as Appendix A is a copy of Senate Executive Report 93-5, 93rd Cong. 1st Sess., (1973). This Report lists the pertinent provisions of the Convention and gives an interpretation of each provision based upon the testimony offered at the earlier hearings. A copy of the Convention will also be made available to any interested party.

CONCLUSION

Eighty-two nations to-date have ratified and/or acceded to the Genocide Convention. The world community has, therefore, defined Genocide as "a crime against the laws of nations". The United States is a party to other treaties that define and establish an international crime. (The Geneva Conventions On Protection Of War Victims, 1949, TIAS 3362-3365; The Conventions For The Regulation Of Whaling, 1935, TS 880, 1946, TIAS 1849; the International Convention for the Prevention of the Pollution of the Sea by Oil, 1954, TIAS 4900 and the Single Convention On Narcotic Drugs, 1961, TIAS 6208.) Statements made in the past and raised in the Senate and the ABA House of Delegates are no longer pertinent. The passage of time has confirmed that Genocide is a matter of "international concern" which should be regulated as an international crime. Acceding to the Convention at this time is a positive step in the national interest of our country. The American Bar Association should come forward and place on record its positive support.

This resolution was overwhelmingly approved by the Council of the Section of International Law at its Mid-Winter Meeting on December 5-7, 1975.

Respectfully submitted,

RICHARD P. BROWN, Jr.,
Chairman, Section of International Law.

February, 1976.

(Genocide Convention, hearings, Committee on Foreign Relations, U.S. Senate, 95-1, May 24 and 26, 1977, pp. 48-52.)

PREPARED STATEMENT OF JUDGE THOMAS BUERGENTHAL

Mr. Chairman: My name is Thomas Buergenthal. I am the Chairman of the Human Rights Committee of the International Law Section of the American Bar Association. I am also the Dean of The American University Law School and the only American judge on the Inter-American Court of Human Rights.

Mr. Chairman, It is a great honor for me to appear before your Committee as the representative of the ABA and to support United States ratification of the Genocide Convention. As an international lawyer, as a naturalized U.S. citizen, and as a survivor of the Auschwitz concentration camp, I am profoundly moved to have this opportunity to represent the ABA in urging U.S. ratification of a treaty that symbolizes mankind's revulsion against and rejection of the ideology that made the Holocaust possible and in which I lost all but one member of my immediate family. There are not many countries in the world where a person with my background would be accorded the privilege to represent the organized bar before a legislative body on an issue of such importance or, for that matter, on any issue. It is, therefore, a source of considerable sadness for me that this great country of ours, which is committed to and lives by the very ideals that

provide the strongest bulwark against genocide should, 36 years after World War II, still not have ratified the Genocide Convention.

Today, even without the Genocide Convention, international law outlaws genocide—that conclusion is no longer open to doubt. The Convention thus merely codifies what general international law prohibits.

Although the United States would therefore not be assuming any additional substantial legal obligations it does not already have, U.S. ratification of the Genocide Convention would be an act of great symbolic importance because it would associate the United States with the international community's unequivocal rejection of genocide and the totalitarian ideologies, whether of the right or of the left, that produce genocide.

The United States cannot hope to play a leading role in opposing totalitarianism and in promoting individual liberties in the world while refusing, at the same time, to associate itself with those international instruments in which the international community proclaims its allegiance to the very principles the United States advocates.

The fact that many of the 90 governments that have ratified the Genocide Convention are among the most brutal violators of human rights does not justify our failure to ratify this treaty. Totalitarian regimes sign human rights treaties because that makes for good propaganda, but it is good propaganda precisely because it capitalizes on the universality of mankind's yearning for human rights, which is the strongest enemy of totalitarianism. The United States has to associate itself not only in fact but also symbolically with this yearning. The world's greatest democracy needs to identify itself with mankind's aspirations to hold all governments to a code of conduct that outlaws genocide. Those who fight for democracy and human dignity, whether it be in the Soviet Union, in Poland, in Cambodia, in Afghanistan, need to know, in order to carry on their struggle, that they are not alone, that their struggle is not hopeless, and that at least some governments which ratify human rights treaties are committed to the principles these treaties proclaim.

Mr. Chairman, I happen to believe that our strongest foreign policy asset is this country's commitment to individual freedom and democracy. When we, in our foreign dealings, are true to these ideals, we promote our own foreign policy interests to the utmost, putting world Communism on the defensive. Nothing exposes the evil and the weakness of the Communist system more effectively than acts by the United States which demonstrate that this country shares mankind's aspirations for freedom and human dignity which Communism so brutally suppresses. U.S. ratification of the Genocide Convention, by proclaiming this country's solemn commitment to the eradication of genocide, would be just such a demonstration.

In common with the membership of the ABA, I am totally opposed to U.S. ratification of any treaty that would violate our Constitution. If I thought that the Genocide Convention, in the form in which it is presented for ratification, raised serious constitutional law issues, I would oppose its ratification and so, quite obviously, would the ABA. But this is not the case. Whether or not the United States should ratify the Convention is a policy decision that presents no constitutional law obstacles. It is a decision that can and should therefore be made by asking whether ratification would advance U.S. foreign policy interests. I believe that the answer to this question is yes, and that is why I hope very much that your Committee, Mr. Chairman, and the Senate as a whole will opt for ratification of the Convention. It symbolizes mankind's aspirations for a better world. The American people cannot but benefit from identifying themselves with a world-wide movement that is sustained by these aspirations. These aspirations are our strongest weapon in the struggle against Communist expansionism and totalitarian oppression.

(Genocide Convention, hearing, Committee on Foreign Relations, U.S. Senate, 97-1, December 3, 1981, pp. 113-114.)

PREPARED STATEMENT OF JOHN NORTON MOORE, VICE-CHAIRMAN, DIVISION OF PUBLIC INTERNATIONAL LAW, SECTION OF INTERNATIONAL LAW; THOMAS BUERGENTHAL, CHAIRMAN, COMMITTEE ON INTERNATIONAL HUMAN RIGHTS, SECTION OF INTERNATIONAL LAW; AND BRUNO BITKER, MEMBER, STANDING COMMITTEE ON WORLD ORDER UNDER LAW, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee: My name is John Norton Moore, and I am honored to accept your invitation, on behalf of the American Bar Association President, to express the support of the 285,000-member ABA for immediate Senate advice and consent to ratification of the Convention on the Prevention and Punishment of the Crime of Genocide.

I appear today as the Divisional Vice-Chairman for Public International Law of the ABA's Section of International Law. I am the Walter Brown Professor of Law at the University of Virginia and direct that university's Center for Law and National Security. Accompanying me are two distinguished international law scholars and recognized experts on the Genocide Convention.

The Honorable Thomas Buergenthal is Dean of the Washington College of Law of the American University, is a Judge on the Inter-American Court of Human Rights and serves as Chairman of the International Law Section's Committee on International Human Rights.

Mr. Bruno Bitker is a lawyer in Milwaukee, Wisconsin and is a member, and past chairman, of the Association's Standing Committee on World Order Under Law. Mr. Bitker is a leader, both within and without the Association, in the 32-year effort to ratify the Genocide Convention, and testified to that effect for the ABA before this Committee in 1977.

INTEREST OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman, the ABA has concerned itself with this treaty for nearly as long as the Convention has been before the Senate. Some three months after the Convention was transmitted by President Truman to the Senate on June 10, 1949, for its advice and consent, the Association's House of Delegates resolved to oppose ratification of the treaty "as submitted" by the President. For over 20 years thereafter, various Association entities continued to study the constitutional issues raised by the Convention; a resolution in support of ratification was defeated in February 1970 by a 130-126 vote of our House of Delegates.

Subsequently, various ABA groups reviewed the understandings and declaration which were the basis for this Committee's approval of the Convention by voice vote early in 1973. These three understandings and a declaration fully resolved the constitutional concerns of the ABA. Consequently, in February 1976, the Association's House of Delegates by voice vote approved a resolution favoring ratification with the understandings and declaration recommended by this Committee.

Ratification of the Genocide Convention is now one of the legislative priorities of the ABA President, and as such is one of a handful of legislative goals of the highest importance to the Association. As Mr. Bitker told this Committee in 1977, "[C]ertainly nothing is more basic to the obligation the United States assumed when it ratified the U.N. Charter, than to outlaw mass murder of a national, ethnical, racial or religious group, as such, whether committed in time of peace or war . . . [United States'] failure to ratify borders on constituting a national disgrace." We urge this Committee, the Senate and our

Government to end this period of national disgrace by promptly ratifying this Convention.

As lawyers, we think the legal profession has a unique role to play in this ratification process. In a May 1977 address to the 20th anniversary meeting of the Inter-American Bar Foundation, then-ABA President William B. Spann observed that the Association's Code of Professional Responsibility "makes it quite clear that a lawyer should not regard himself simply as a functionary of the legal system, but as one who must defend and develop it."¹ There is no more basic human right for which the legal system was established to defend, than the right of a human to live.

There are countries throughout the world whose governmental recognition of this right could be questioned. Mass slaughter of hundreds of thousands of citizens from identifiable ethnic or religious groups has repulsed the world in recent years. These events are evidence that genocide is a crime against mankind and one threatening the peace and security of the world, that it can only be prevented and punished through enforcement of recognized international law, that the United States should be the leading force in the world officially to condemn this crime. To state our opposition to genocide, but to refrain from actively seeking to prevent it, is merely to sanction its perpetuation.

In February 1976 the ABA's policy-making House of Delegates adopted the following resolution by voice vote:

Be It Resolved, That the American Bar Association favors the accession of the United States to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide with the following Understandings and Declaration which have been approved by the Senate Committee on Foreign Relations:²

1. That the U.S. Government understands and construes the words "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" appearing in article II to mean the intent to destroy a national, ethnical, racial or religious group by the acts specified in article II in such a manner as to affect a substantial part of the group concerned.

2. That the U.S. Government understands and construes the words "mental harm" appearing in article II(b) of this Convention to mean permanent impairment of mental faculties.

3. That the U.S. Government understands and construes article VI of the Convention in accordance with the agreed language of the Report of the Legal Committee of the United Nations General Assembly that nothing in Article VI shall affect the right of any state to bring to trial before its own tribunals of any of its nationals for acts committed outside the state.

4. That the U.S. Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in article V has been enacted.

Be It Further Resolved, That the President of the American Bar Association or his designee is hereby authorized to present the views of the Association as herein expressed before the appropriate committees of the Congress and other agencies of the Government of the United States.

The American Bar Association, through adoption of this policy, agrees with the Departments of State and Justice that the Convention, along with the recommended understandings and declaration, pose no constitutional obstacles to ratification. Were this not the case, the first stated purpose of the ABA—"... to uphold and defend the Constitution of the United States..."—would prohibit us from supporting ratification, much less supporting it as strongly as we do.

WHAT THE CONVENTION PROVIDES—OBLIGATIONS OF THE UNITED STATES

The Genocide Convention has established within the body of international law the intentional crime of mass destruction of people—of the whole or a substantial part of a national, ethnical, racial or religious group. Applicable in peacetime and during war, genocidal acts include intentional killing, causing of serious bodily or mental harm (understood by the United States to mean "permanent impairment of mental faculties"), inflicting living conditions so adverse as to intend to cause the group's destruction, imposing measures intended to prevent births within the group—thus destroying the group, and forcibly trans-

¹ William B. Spann, "Lawyers and the Promotion of Human Rights in America", The Legal Protection of Human Rights in the Western Hemisphere, 22, Inter-American Bar Foundation (March 1978).

² International Convention on the Prevention and Punishment of the Crime of Genocide, Report on Executive O, 81st Congress, 1st Session (Ex. Report No. 93-5; March 6, 1973).

ferring children of the group to another group. Punishable acts include the actual commission of genocide, as well as conspiracy in, or direct and public incitement of, or attempt to commit, genocide, or complicity in committing genocide.

Persons charged with any of these offenses, whether public officials or private citizens, shall be tried in the state where the offense was alleged to have occurred or before an international tribunal. No such international tribunal or competent jurisdiction exists; if one were established, the United States Congress would have to approve submitting to the new court's jurisdiction. One of the understandings approved by the Foreign Relations Committee, and endorsed by the ABA, would make clear that U.S. citizens could be tried in U.S. courts for genocidal acts committed abroad. Furthermore, while the Convention provides that contracting parties shall grant extradition requests "in accordance with their laws and treaties in force" (Article VII), the Convention itself is not an extradition treaty. Since no current extradition treaties to which the United States is a party cover the crime of genocide, the United States would not be obligated to extradite U.S. citizens to a foreign country. Any future extradition treaty which might include the crime of genocide would, of course, be subject to the advise and consent power of the Senate. Each country would establish its own penalties to be imposed for convictions of the enumerated crimes.

A contracting party to the Convention may request appropriate U.N. entities to take action to assist in preventing or suppressing genocide (Article VIII). Also, the contracting parties will submit to the International Court of Justice disputes concerning the "interpretation, application or fulfillment" of the terms of the Convention (Article IX). This provision does not fall under the Connally amendment, by which the United States determines which cases are within the domestic jurisdiction of the United States, and thus outside the court's jurisdiction. However, provisions comparable to Article IX for resolution of disputes by the International Court of Justice are included in such treaties as the Japanese Peace Treaty and the Antarctic Treaty, to which the United States is a party.

Finally, the United States has declared that it will not deposit its instrument of ratification following Senate approval until after enactment by Congress of implementing legislation.² Thus, the Genocide Convention is not a self-executing treaty, but rather one requiring the usual legislative approval of both Houses of Congress and the President.

Over the lengthy period of congressional debate over the meaning and possible adverse effects of the Convention's provisions, a number of recurring questions have been raised. For the benefit of the Committee, we attach to this statement nine of the most frequently asked questions, and our responses. To summarize the attached responses, the ABA simply finds no responsible support for various constitutional questions raised against the Convention. To suggest that the protection against mass murder of a selected people is an improper subject of international concern, and thus without this nation's treaty power, is nonsense. Similarly, other legal issues concerning, for instance, the effect of voluntary birth control, the acts of soldiers in wartime and the "incitement" language of Article III all have long been resolved in the context of U.S. domestic law or international law.

The fact that these legal issues are without merit is perhaps best substantiated by the testimony before this Committee in 1970 by then-Assistant Attorney General William H. Rehnquist:

"In 1950 some of the questions concerning Federal jurisdiction and the treaty power were considered somewhat novel. However, developments in the intervening years—the extensive use of the treaty power and the growth of Federal criminal jurisdiction—have, it seems, illuminated both these areas to the point where I believe I can safely say that the questions before the Committee and the Senate are more matters of policy than questions of legal power. Other witnesses in support of this treaty have, I believe, made this clear."

THE GENOCIDE CONVENTION SHOULD BE RATIFIED NOW

The United States should ratify the Genocide Convention immediately because such an act would be a timely expression of this nation's unalterable commitment to the rule of law in international affairs, because it would strengthen our hand in the current conduct of foreign relations with allies and adversaries alike, and because it would place us in the company of 89 other nations—where we should

² See Ex. Report No. 93-5 for the text of proposed implementing legislation, pages 21-23, 93rd Congress, 1st Session (March 6, 1973).

have been long ago—in expressing our collective national repugnance to mass acts of murder of unspeakable proportions.

As a member nation of the United Nations, and as a signatory to the Helsinki Accords, among other agreements, the United States has demonstrated its leadership in seeking to bring more order to the peaceful relations among nations. The essence of this commitment is our devotion to an ordered existence governed by universally accepted rules and procedures—the rule of law. Since our own freedoms are assured through adherence to the rule of law—a concept by no means universally accepted throughout the world—our sovereignty is that much more enhanced through our efforts to expand the primary of the rule of law in our relations with other nations. Ratification of the Genocide Convention furthers this cause.

It is clear to most observers that the Soviet Union and other nations with less regard for the type of freedoms we take for granted pose the most serious threat to our national interests. As Dean Buerghenthal recently stated, the threat of the Soviet Union:

"Is not only military or subversive, it is also ideological and it must therefore be confronted on the ideological level as well . . . A sound human rights policy provides the U.S. with an ideology that distinguishes us most clearly from the Soviet Union and seriously undercuts the ideological appeal of Communism."

However, our ideological hand is not strong in dealing with the Soviets when our criticism of their treatment of religious or ethnic groups prompts the question of why the United States has not ratified the Genocide Convention. In the terminology of legal equity, ratification of the Convention would bring us to the international negotiating table with "clean hands."

Finally, it is important to remember that this treaty is hardly a novel idea. It has been in force for some 30 years and is the law in the majority of the world. The United States was a leading participant in drafting the treaty and in advocating its importance. The crime of genocide surely is the most difficult for civilized people to comprehend, and the most shocking to the human conscience. The extent to which most of the rest of the world has signaled its horror of this crime by ratifying the Convention is both a measure of this country's humiliation at not being a signatory, and the strongest reason why ratification should wait no longer.

Mr. Chairman, we thank you for this opportunity to again urge ratification of this Convention, and will be pleased to respond to your questions.

QUESTIONS AND ANSWERS CONCERNING THE GENOCIDE CONVENTION

Question 1. Doesn't the Convention allow the United Nations to investigate United States domestic officials and thus subject our Government to irresponsible charges of genocide in the World Forum?

Answer. Article VIII which empowers a contracting party to call upon the competent organs of the United Nations "to take such action under the Charter . . . as they consider appropriate for the powers of the United Nations. Genocide, involving mass murder on a broad scale, would violate not only the human rights provisions of the UN Charter but would normally involve a threat to the peace and therefore would clearly be within the powers of the UN to discuss. It need also be noted that article 2(7) of the UN Charter contains a proscription against intervention in matters which are essentially within the domestic jurisdiction of any state. . . ."

The argument that ratification of the Convention would subject the United States to irresponsible charges of genocide is without foundation. Ratification would not alter the present situation to our disadvantage. Spurious propaganda charges alleging genocide can be made by our enemies whether or not the United States is a party to the Convention. If anything, ratification would improve our position to rebut spurious charges by subjecting our behavior to a precise legal definition of genocide. Further, our failure to ratify in fact weakens the effectiveness of our replies.

Question 2. Isn't it true that the Genocide Convention would allow United States POW's to be charged with genocide by enemy nations?

Answer. An inference such as this overlooks the simple reality that such a charge may be made by the authorities of a state involved in a conflict with the United States with or without the Genocide Convention. There is nothing in the Genocide Convention that would provide warrant for charges by an enemy nation that our POW's are guilty of genocide. The existence of the Genoc-

cide Convention, and more importantly the ratification or rejection of the Convention by the United States, would have little effect on the treatment of American POW's. This was clear in the cases of American POW's held by North Vietnam (where neither state was party to the Convention). Their peril will not be increased by approval of the Convention while peril may be avoided for tens of millions by ratification of the Convention.

Question 3. Wouldn't the Convention change the constitutional structure of the United States in that the United States lacks the constitutional power to make treaties in the human rights field because treatment by a state of its own nationals is a domestic matter and not properly the subject of an international agreement?

Answer. In the past, the power of the United States under the Constitution to make treaties in the human rights field has been questioned on the grounds that the treatment by a state of its nationals is a matter of domestic jurisdiction. This was one of the points raised in opposition to the Genocide Convention by the American Bar Association. However, the special Committee of Lawyers of the President's Commission for the Observance of Human Rights Year 1968 concluded after a survey of the constitutional issues involved and of the past treaty making practice of the United States that, "Treaties which deal with the rights of individuals within their own countries as a matter of international concern may be a proper exercise of the treaty-making power of the United States . . ."

The Supreme Court declared in *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890), that the treaty-making power may be exercised on any matter "which is properly the subject of negotiation with a foreign country". The United States is a party to numerous international agreements relating to the activities of its own citizens within the United States because those treaties deal with matters appropriate for international negotiation. Examples include treaties on narcotics, public health and nature conservation, and the Supplementary Convention on Slavery.

In the words of the Special Committee of Lawyers, of which retired Supreme Court Justice Tom C. Clark was chairman: "It may seem almost anachronistic that this question continues to be raised." This concern needs to be determined objectively in the light of the current interests of the United States in an interdependent world and contemporary concepts of international law—not on the basis of notions that may have been appropriate in a different historical time. In today's world the massive destruction of a racial, religious or national group in one country has an immediate impact on members of this group in other countries, stimulates demand for intervention and adversely affects international relations. As said by the Senate Foreign Relations Committee: "on both moral and practical grounds, the Commission of genocide, involving as it must mass action, cannot help but be of concern to the community of nations".

Question 4. Isn't it true that the Genocide Convention would alter the balance of authority between the State and Federal government?

Answer. The Constitution, Article I, Section 8, specifically gives Congress the power to "define and punish . . . offenses against the law of Nations". The act of genocide is almost universally recognized in treaties, international custom, and the acts of international organizations as an offense against the law of nations. It is thus clearly within the power of Congress to outlaw the crime of genocide. Ratification of the Genocide convention will add no powers to those the Federal Government already possesses.

Question 5. Wouldn't birth control offered on a voluntary basis be subject to attack as genocide?

Answer. This fear has no foundation. None of the five acts in the Convention definition is genocide unless "committed with intent to destroy in whole or in part" one of the named group as such. Thus, basic to any charge of genocide is the element of intent. To avoid any misconceptions the United States ratification would be accompanied by an understanding that the intent required by the Convention be the intent to destroy one of the named groups "in such a manner as to affect a substantial part of the group concerned".

Question 6. Couldn't the Convention result in the bringing of United States citizens to arrest and trial in foreign areas on charges of genocide?

Answer. The Convention does impose an obligation on the State in whose territory acts of genocide had been committed to try all persons charged with committing genocide within that State. However, it is clear from the Convention's negotiating history that the Convention does not bar another State from trying before its own tribunals its nationals who had committed such acts outside the State. This theory of concurrent jurisdiction—jurisdiction based on the

site of the alleged offense and jurisdiction based on the nationality of the offender—has been thoroughly explored. The United States government, however, made it clear to the other contracting parties that it intends to construe the Convention so as to permit it to try its own nationals for punishable genocidal acts whether committed at home or abroad. This is recorded in the United States understanding that the United States Government "understands and construes Article VI . . . that nothing in Article VI shall affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State".

Question 7. Doesn't the Convention open the possibility that United States citizens can be extradited and subject to trial for genocide before a foreign tribunal without constitutional protection and benefits?

Answer. Ratification of the Convention would merely permit the adding on of one or more crimes—genocide—to the many crimes for which American citizens may already be extradited under existing extradition treaties. The Convention is not itself an extradition treaty. Neither United States law nor any of the U.S. extradition treaties at present cover genocide. Under the Convention extradition would take place only in accordance with laws and treaties in force. In any case, the United States does not grant extraction unless a *prima facie* case is established against the accused and unless the accused will be afforded by the requesting state the due process required by our Constitution. Such a treaty could be negotiated in the future with or without the Genocide Convention but it would need to be brought before the Senate for approval.

Question 8. Isn't it true that ratification of the Convention would subject United States citizens to trial before international penal tribunals?

Answer. No. It is unfortunate draftsmanship that Article VI of the Convention provides persons charged with genocide shall be tried "by such international tribunal as may have jurisdiction . . ." No such international tribunal presently exists and there is no negotiation to create one. If any such tribunal were established it would not have jurisdiction over United States nationals unless the United States agreed to such jurisdiction either in the form of the Senate's advice and consent to ratification of a treaty or by statute expressing its consent.

Question 9. Doesn't the provision in the Convention for settlement of disputes by the International Court of Justice unreasonably limit United States sovereignty?

Answer. The provision in the Convention is not a new one in the United States practice. The United States has become a party to many international agreements providing for reference to the International Court of Justice of disputes arising under such agreements, including the Japanese Peace Treaty, the Antarctic Treaty and the Statute of the International Atomic Energy Agency. This provision for the settlement of disputes over the interpretation of the Genocide Convention does not unreasonably limit our sovereignty.

A number of countries, notably the communist countries, have entered reservations to their ratifications stating that they do not accept compulsory reference to the International Court of Justice. The United States is thus placed in a position to invoke those countries' reservations in its own behalf to defeat the court's jurisdiction in cases brought under the Convention by countries which have made such a reservation. Our interests are better served by having any charges of genocide against us considered in a less politically motivated forum like the International Court of Justice.

(Genocide Convention, hearing, Committee on Foreign Relations, U.S. Senate, 97-1, December 3, 1981, pp. 116-121.)

PREPARED STATEMENT OF HON. WILLIAM PROXMIRE

Thank you, Mr. Chairman.

I particularly want to commend you for the priority you have given this important human rights treaty, since assuming chairmanship of this Committee. Your efforts here today are continuing a long and bipartisan tradition of support for the Genocide Convention, which has been marked by four reports to the Senate enthusiastically recommending ratification. The Committee's tireless efforts to restore America's proper role as a world leader on human rights will not go unnoticed when the Senate ratifies the Genocide Convention.

Mr. Chairman, you are right to be moving ahead now. This is an opportune moment.

First. We have a new Administration—in office nearly a year now—and it is time to get them on record. In announcing the appointment of Elliot Abrams as the State Department's new Human Rights Coordinator, Secretary Haig pledged to restore human rights as a priority within our foreign policy.

Second. We have a new international climate which firmly underscores the need for the United States to regain the high moral ground in our competition with those who wish us ill. We have yielded this ground all too cavalierly by smugly asserting that our own record speaks for itself. It is a luxury that we can not afford if our diplomats are to speak out, and speak out forcefully, against the repressive actions of closed, totalitarian societies.

Third. We have a new Senate. Thirty-eight Members have been elected since your last hearings in 1977. Your own Committee reflects that change, Mr. Chairman. Only six of the current seventeen Members served on this Committee during the 1977 hearings and, only one, Senator Pell, was here when I testified during the 1970 hearings. A new hearing record will be helpful in dispelling any lingering arguments of the opponents of this Convention so that we can at long last proceed to ratification.

A TREATY TO PUNISH CRIMINALS

Mr. Chairman, in reviewing your earlier hearings, I was impressed by the great lengths to which your Committee has gone to consider every argument, allegation and concern raised by the opponents of this Convention. The accumulated testimony effectively refutes those arguments, demonstrating that the

Genocide Convention, together with the Understandings recommended by your Committee, deserves our wholehearted support.

As I pointed out during my testimony in 1977, few treaties have ever received the type of detailed line by line, word by word, syllable by syllable scrutiny that the Genocide Convention has received.

That review has demonstrated that the Genocide Convention really has two aspects.

First, it is a human rights treaty, which seeks to protect the most fundamental right known to mankind—the precious right to live.

Second, it is an international criminal treaty. A treaty designed to ensure that all nations, consistent with their own Constitutions, will do everything possible to prevent and punish criminals who attempt to commit the most heinous crime—the elimination of an entire national, ethnic, racial and religious group.

The history of the Genocide Convention is clear on that second point.

The fact that the Genocide Convention evolved from the outrage of all decent human beings to the monstrous actions of the Nazis in attempting to eliminate every man, woman and child of Jewish ancestry within their borders is apparent to everyone.

What is not as apparent is the fact that the Genocide Convention exists because the International Military Tribunal at Nuremberg determined that consideration of genocide was outside of the charter that established their Tribunal.

International reaction was swift. The General Assembly, with our support and encouragement, unanimously adopted a resolution declaring genocide an international crime. In the next two years, the Secretary General's office, the Economic and Social Council and a drafting committee, chaired by the United States delegate, John Makos, labored to draft a Convention which would implement the General Assembly's resolution. In 1948 the General Assembly, with the enthusiastic support of the United States delegation, unanimously adopted the Genocide Convention and two days later the United States signed the Convention.

AMERICANS SUPPORT THE GENOCIDE CONVENTION

Mr. Chairman, since President Truman submitted the Genocide Convention to the Senate for ratification, this treaty has had the broad support of Americans across the country as well as their leaders.

President after President, Administration after Administration, have given this treaty their enthusiastic support—Republicans and Democrats alike, conservative and liberal alike.

This is not a partisan issue. It is not ideological.

The ranks of the Genocide Convention supporters cross party lines and ideological lines.

In fact, you will be hearing very shortly from the Ad Hoc Committee on the Genocide and Human Rights Treaties, a coalition of 52 labor, civic, religious and nationality organizations, representing millions of Americans across this country.

GENOCIDE CONVENTION IS IN THE INTEREST OF ALL AMERICANS

And why do they support the Genocide Convention, Mr. Chairman?

Because it will serve America's interests. The interests of our citizens, our voters, our taxpayers.

The benefits of this treaty are not elusive. They are real and concrete.

Let me just cite a few of the reasons for ratification.

First, ratification of the Genocide Convention will strengthen our hand in attacking the gross violation of human rights by the Soviet Union and its allies. While the treaty itself is narrowly constructed, your 1970 hearing record makes it clear how this treaty will help.

Rita Hauser, a Republican respected on both sides of the aisle, and President Nixon's delegate to the Human Rights Commission, testified:

"We have frequently invoked the terms of this Convention as well as the provisions of the Universal Declaration on Human Rights . . . in our continued aggressive attack against the Soviet Union for its practices, particularly as to its large Jewish communities, but also as to the Ukrainians, Tartars, Baptists and others. It is this anomaly . . . (that) . . . often leads to the retort in debates plainly put, simply put, 'Who are you to invoke a treaty that you are not a party to?'"

The 1977 hearings provide other devastating examples:

"The Soviet Union, usually on the defensive when the issue of . . . human rights was proposed at the U.N., could and would charge the U.S. with hypocrisy. In January, 1964, for example, when the U.S. member of the Subcommittee on Prevention of Discrimination, Morris Abram, advocated forceful measures of implementation in dealing with racial and ethnic discrimination, this Soviet colleague had but to remind the body that the U.S. was not even a contracting party to the Genocide Convention. . . .

"Two years later, Abram . . . vigorously endorsed a Costa Rican proposal that would have marked a significant breakthrough in the area of international human rights enforcement. . . . The Soviet Union's response was devastating. Its representative pointed out that in view of the fact that Americans 'resolutely refused to accept legal obligations' through ratification of human rights treaties, it was 'almost indecent' and certainly 'hypocritical' for the U.S. to advocate the establishment of special human rights institutions in the international field. Shortly afterward, Pravda drove the point home. . . . It was 'no accident', the Communist Party organ commented, that the U.S. had not ratified the Genocide Convention since 'racial and national oppression is still very widespread in the United States of America.'"

Our representatives to the Helsinki Accord review conferences make a similar point. That where the United States should be on the offensive, holding the feet of the Soviet Union and its allies to the fire to live up to their pledges on human rights, instead we spend our time apologizing for our record on ratification of human rights treaties.

Mr. Chairman, the time has long since passed when we can smugly sit back and assume that our human rights record—which I firmly believe is the finest in the world—speaks for itself. Why permit Communist nations, which all too often only give lip service to these obligations, to take the high moral ground in these debates? Mr. Chairman, they have no right to it and we are foolish to abandon it to them.

If the Vietnamese communists commit genocide against religious groups in Cambodia, I want the United States to tell the world about it without challenge to our human rights dedication from other communist nations.

If the People's Republic of China systematically commits genocide against the Tibetans, I want us to be free to condemn that action without the inevitable propaganda about our failure to pass the Genocide Convention.

If one day the Russians turn against one of their national minorities, and commit genocide, then the United States should be the world leader opposing that action. Nothing less should be expected from this nation. But we will be unable to do this effectively without passage of the Genocide Convention.

In sum, it is unlikely that genocide will be committed in any Western democratic nation. It is more likely that genocide will occur in non-democratic, totalitarian or Communist States. We need every device at our disposal to preclude that this happens, and if it does occur, God forbid, we need every diplomatic, economic and possibly military asset to stop such events.

We cannot do moral battle against genocide with one hand tied behind our backs.

Second, ratification of the Genocide Convention reasserts our intention to deal firmly with criminals who have violated the most sacred right known to man.

There is firm precedent for ratification of this type of criminal treaty. Just this year, in July, the United States approved a treaty dealing with hostages, unanimously. We were following the same policy on issues such as narcotics (1961), pollution of the sea by oil (1954) and treatment of prisoners of war (1949).

Contemporary practice makes it clear that the Senate has the authority to approve treaties involving international treaties and to hold Americans accountable for their actions before American Courts (as the Genocide Convention and its implementing legislation provides) for actions committed abroad.

Third, the ratification of the Genocide Convention will help our relations with Third World nations as well. Our failure to ratify a treaty so consistent with the high ideals expressed in our Declaration of Independence, Constitution and Bill of Rights, places us in dubious company with nations such as South Africa whose dedication to human rights is clearly questionable. With all other major Free World countries supporting the Convention, our inaction raises unnecessary doubts regarding our ability to lead.

Fourth, the ratification of this Convention would place the United States in a better position to bring our moral influence to bear in specific cases where genocide is alleged. For example, in the early seventies the State Department wrote to me, indicating that our efforts to halt the genocide of Biafrans during the Nigerian civil war would have been strengthened immeasurably had we been a party to the Convention.

Finally, there is a moral imperative to ratify this treaty. Domestic statutes regarding murder are insufficient for, as Senator Javits has correctly pointed out, "genocide is murder and more."

The different effect of this type of treaty is impossible to quantify but, as Bruno Bitker noted during your 1970 hearing, "The requirements of morality are more likely to be recognized if they are also the requirement of law."

SUBMISSIONS FOR THE RECORD

Mr. Chairman, I have not attempted in my statement to provide a line by line discussion of the Genocide Convention and the arguments that will be raised by Liberty Lobby later in this hearing. Your next panel will be addressing those questions and I have merely attempted to set the stage for that discussion.

However, I would like your permission to include as a permanent part of this record, at the conclusion of my statement, material which I believe will be helpful to the committee's review:

"(1) An article by article analysis of the Genocide Convention just produced by the Congressional Research Service at my request. I have also provided additional copies to every Member of the Committee.

"(2) Copies of speeches which I have made responding in detail to the arguments of the new Liberty Lobby White Paper on the Genocide Convention, about which you will be hearing more shortly.

"(3) Letters from each branch of the Armed Services and the General Counsel of the Defense Department during the Carter Administration, outlining their support for the Convention.

"(4) A listing of 52 labor, civic, religious and nationality groups which endorse the Genocide Convention.

"(5) A law review article by Louis Henkin from the April, 1968 issue of the University of Pennsylvania Law Review entitled 'The Constitution, Treaties and International Human Rights', which conclusively proves the constitutionality of treaties such as the Genocide Convention."

Mr. Chairman, the fight for ratification of this Convention has often been frustrating. As Senator Javits noted during the 1977 hearings, "The numbers of rumors, innuendos, misconceptions and scares that have been spread about this treaty are literally endless, and this has been done by people who are very, very competent and able in many other ways, but who somehow have an absolute blind spot on this one."

IN CONCLUSION

Mr. Chairman, some opponents of the Genocide Convention want it both ways.

On the one hand, they assert that the Genocide Convention is a strong document, threatening our very civil liberties—a position which is simply not substantiated by this Committee's own hearing record.

On the other hand, they argue that the Treaty is a "paper tiger". Where is the real enforcement authority they ask? Yet this question comes most often from those who would oppose any international enforcement mechanism the most.

Let me get the record straight.

This Senator is no advocate of One World government.

This Senator does not support any Super Government with "enforcement authority" to interfere in our internal affairs.

I do not believe in yielding United States sovereignty in any way.

And this Treaty does not do that.

This is a very limited Treaty. Not a panacea for the world's ills. Not a step toward One World Government.

But it is an important moral statement, a strong diplomatic tool in the hands of the world's most powerful and influential country.

(Genocide Convention, hearing, Committee on Foreign Relations, U.S. Senate, 97-1, December 3, 1981, pp. 17-20.)

**Ratification of
The Convention
on The Prevention
And Punishment of
The Crime of
Genocide**

**Conflict Analysis Center
Washington, D.C.**

INTRODUCTION

Raphael Lemkin, in 1944, coined the word "genocide" to signify the horror the world met face-to-face in the Nazi Holocaust. Its Greek root "genos" and Latin root "gens" mean race or kind and occur in "genesis," "progeny," and "geneology." Its suffix, "cide," derives from the Latin "caedere," meaning to kill. Genocide is the murder of a people; it is homicide directed at the family of man.

The need for the word "genocide" reflects the morbid historical facts of its origin. That the need is modern reflects, too, a twentieth century irony: science and technology help us live fuller lives while they may also be used to erode the protections we have. Daily we uncover secrets of anatomy, chemistry, physics, and psychology. We keep ever bigger records on ever smaller memory chips, communicate easily over long distances, and travel quickly from place to place. These developments of contemporary society pose benefits and, in hands guided by grotesque political ideologies, enhanced risk.

Genocide is particularly poignant for Americans today, for it is more than a memory from others' stories. Many United States citizens came here during the Armenian genocide; others once were refugees from or had relatives killed in Hitler's death camps; and more recently, immigrants from Cambodia fled a contemporary communist slaughter and now are on the path to American citizenship. Family, friends, sojourners, and countrymen, America includes survivors and witnesses of genocide. Raphael Lemkin, for instance, was a Polish Jew who lost 49 family members to the Nazis. He immigrated to the United States in 1941. A scholar, teacher, and lawyer, he was a World War II advisor to the United States War Department and subsequently to Robert Jackson, United States Prosecutor at the Nuremberg War Crimes Trials. He was an important force behind the movement to make

genocide an international crime, and he chose the United States as his new and cherished home. He died in New York City in 1959.

Such points of background—derivation of words, the enhanced potential for both good and bad from science and technology, and recent tragic history—introduce the Convention on the Prevention and Punishment of the Crime of Genocide, a treaty intended to place all nations on record together against that special form of murder. Drafted over a two-year period by a United Nations committee chaired by United States Delegate John Maktos, the Genocide Convention was adopted unanimously by the General Assembly meeting in Paris on December 9, 1948. It was signed two days later by the United States. The treaty establishes principles and definitions, makes genocide a crime under international law, and pledges that signatory nations will make genocide a crime under their national law. The American delegation led the fight for adoption, and before the vote, the chief United States Delegate, Assistant Secretary of State Ernest A. Gross, stated:

In a world beset by many problems and great difficulties, we should proceed with this convention before the memory of recent horrifying genocidal acts has faded from the minds and conscience of man. Positive action must be taken now. My government is eager to see a genocide convention adopted at this session of the Assembly and signed by all member states before we quit with our labors here.

On June 16, 1949, President Truman transmitted the treaty to the Senate with a message urging that it give advice and consent to ratification. The Eisenhower administration recommended in 1953 that ratification would not be timely. The Kennedy administration stated in 1963 that it favored ratification, and the Johnson administration followed suit in 1965. President Nixon, on February 19, 1969, recommended ratification, stating that it "will demonstrate unequivocally our country's desire to participate in the building of international order based on law and justice." The Ford administration endorsed the treaty, President Carter pressed for ratification, and in

his September 6, 1984 address to the B'nai B'rith International convention, President Reagan committed his administration to securing United States ratification, supporting implementing legislation, and using the treaty to protect human rights.

On the congressional side of the treaty ratification process, a special committee of the Senate Foreign Relations Committee held public hearings in 1950. Although the Committee recommended ratification, it did not take steps to carry the treaty forward to the full Senate. Two decades passed until the Committee acted again. In 1970 and 1971, it held hearings and then recommended Senate ratification. At both the 1950 and 1971 hearings, the American Bar Association had opposed ratification. In part prompted by the Committee's favorable 1971 report to the Senate, the ABA placed the treaty under intense scrutiny by its committees and specialists in international law, constitutional law, and related fields. The result was that on February 17, 1976, the most representative body of the ABA, its House of Delegates, passed a resolution that put the ABA squarely behind ratification. On April 13, 1976, the Senate Foreign Relations Committee again recommended Senate advice and consent to ratification, noting in its report the favorable change in the ABA position. In 1977 and 1981, ABA representatives testified in favor of ratification.

As with all treaties, one can argue that some provisions would be stronger if drafted differently. But no arguable defect remotely justifies United States nonadherence to this elemental human rights covenant. In addition to the strong voice of the American Bar, the Departments of State and Defense have advocated ratification, and with the exceptions of the United States, Portugal, and Thailand, all NATO and SEATO members are formal parties to the treaty. From a foreign policy perspective, ratification can only strengthen the bonds between the United States and our West European and Asian allies. Furthermore, by repeatedly raising against us our failure to ratify the Genocide Convention, the Soviet Union distracts attention from its constant human rights violations. Ray Cline and Yonah Alexander recently observed that this American failure is one

of the Soviet Union's most effective propaganda tools: rarely do the Soviets let pass an opportunity to chastise the United States for its "anti-humanitarianism." Thus is the United States, a fortress of freedom and democracy, portrayed as callous, uncaring about human needs, and unconcerned about human rights. Among allies and potential allies, American credibility and effectiveness suffer gradual but steady erosion.

The Convention on the Prevention and Punishment of the Crime of Genocide clearly is good law, good policy, good morality, and good politics. The time has come for the United States to ratify the Genocide Convention and join with 93 other nations to make that treaty work.

This pamphlet was prepared by the Conflict Analysis Center in Washington, D.C. to answer the most frequently raised questions about the treaty. The Conflict Analysis Center is a non-profit, nonpartisan center dedicated to the control of conflict and the preservation of human rights. It is hoped that this pamphlet will assist in speedy United States ratification of the Genocide Convention.

John Norton Moore
President
Conflict Analysis Center

September 1984

"United States ratification of the Genocide Convention is long overdue. This treaty is a strong message of the world community's commitment to preserve basic human rights and to prevent any recurrence of the deliberate destruction of a people.

The atrocities committed against the Armenian people during World War I and against the Jewish people during World War II must never be forgotten, and most certainly must never be repeated. We must dedicate ourselves to the ideal for which they persevered—the right of all people to live and work and raise their children in peace and freedom."

GOVERNOR GEORGE DEUKMEJIAN

**Q • By what process does the United States
• become a party to an international treaty?**

Treaty ratification in the United States has three steps. It begins when the President transmits a treaty to the Senate for its consideration. Unlike legislation that originates in the Congress, the treaty remains in the Senate for its consideration until the Senate has acted, irrespective of the convening of a new Congress or the election of a new President. By a two-thirds majority, the Senate grants its advice and consent to ratification. The Senate returns the treaty to the President, and ratification occurs when he signs it.

A contracting party may attach conditions to its acceptance of a treaty. The Senate may, when giving its advice and consent to ratification, attach one of three kinds of conditions: a **declaration** simply states a fact related to the ratification process; an **understanding** clarifies the meaning of language in the treaty and tells other nations how the country intends to interpret the treaty; and a **reservation** rejects or alters certain provisions of the treaty. Should a nation attach a reservation which undermines the principal goals of a treaty, ratification would not be valid.

Finally, in the United States process, there are two kinds of treaties. Self-executing treaties become effective when they are ratified. No additional legislative action is necessary. Treaties that are not self-executing, however, cannot be enforced until implementing legislation is approved by both houses of Congress and signed by the President. The Genocide Convention is not a self-executing treaty. Once it is ratified, therefore, both houses of Congress must consider implementing legislation to make genocide a crime under the statutes of the United States.

Q • Did the United States influence the content of the Genocide Convention?

Yes. John Maktos, United States Delegate to the United Nations, chaired the committee that

drafted the Genocide Convention. Principles of Western, particularly American, jurisprudence are strongly prominent throughout the treaty. For example, because of United States insistence, the treaty includes a "*mens rea*" element requiring that *intent* to commit genocide must be part of the laws passed by other nations to implement the Genocide Convention. Conviction of the crime of genocide, therefore, must meet the American legal norm for guilt.

In addition to having the central role in drafting the treaty, the American delegation led the General Assembly campaign which concluded with unanimous adoption of the Convention. Under international law, signature of a treaty signifies intent to ratify the agreement. The intent of the United States was underscored when it became one of the first nations to sign the Convention. The failure of the United States to ratify the treaty, particularly after it has become a standard, accepted part of international law, makes the United States' position awkward and places in doubt the good faith obligation implied by signature.

"Ratification...would be in the national interest of the United States. I believe we should delay no longer in taking the final convincing step which would reaffirm that the United States remains as strongly opposed to the crime of genocide as ever. By giving its advice and consent to ratification of this Convention, the Senate of the United States will demonstrate unequivocally our country's desire to participate in the building of international order based on law and justice."

PRESIDENT RICHARD M. NIXON

Q • Would ratification of the Genocide Convention in any way violate or affect the United States Constitution?

No. The Constitution is the supreme law of the land, and it cannot be overridden by any external agreement. It provides for the making of treaties and, in the event of a conflict between a treaty and

any provision of the Constitution, the Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Reid v. Covert*, 354 U.S. 1, 17 (1957). In testimony on the Genocide Convention, then Assistant Attorney General William F. Rehnquist affirmed that "there are no constitutional obstacles to U.S. ratification of the treaty." The rights of American citizens, he stated, would be fully protected under the Convention "because the Constitution is superior to a treaty no matter how interpreted." Furthermore, the Genocide Convention itself guards against a conflict between the treaty and the Constitution. In article V, the Convention provides that the implementing legislation shall be enacted by the contracting parties "in accordance with their respective Constitutions."

"The Convention...protects the most fundamental of all human rights—the right to life—and creates an essential limit on the actions governments may appropriately take with respect to the people they govern.

The right to life was initially proclaimed for this nation in the Declaration of Independence. The promise of the Declaration was to protect that right by instituting a new and democratic government in America. Today it is important that this nation assist the world community to protect the right to life internationally....

Ratification would be a significant enhancement of the human rights commitments of this nation, demonstrating again to the world in concrete fashion our determination to advance and protect human rights."

PRESIDENT JIMMY CARTER

Q • Is ratification of the Genocide Convention • an appropriate exercise of the constitutional power to enter into treaties?

Yes. For almost a century, the Supreme Court has held that, "the treaty power of the United States extends to all proper subjects of negotiation between the government and the governments of

other nations...." *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). Genocide clearly is a proper subject for treaty negotiation. In addition to common sense, this is apparent from the history of World War II as well as a comparison with the subject matter of international treaties the United States has already ratified, which range from the prohibition of slavery to the protection of whales and migratory birds. Morris B. Abram, current Co-Chairman of the United States Commission on Civil Rights, testified in 1976 in favor of "immediate ratification of the Genocide Treaty. [If] this country can ratify treaties with respect to birds," he declared, "it can ratify treaties with respect to [human] beings." Addressing the question of whether the murderous extinction of entire ethnic, national, racial, or religious groups is a proper subject for negotiation between nations, then Assistant Attorney General William F. Rehnquist stated that, "under the treatymaking power, the United States has complete authority to enter into the Genocide Treaty."

"I support ratification of the Genocide Convention....Ratification by the United States may be a very small step in the scheme of things, but it does no credit to a great nation like the United States to hesitate in taking a small step forward for reasons which are not sustained by a serious consideration of American interests in the world."

SENATOR CHARLES H. PERCY

Q • Would ratification of the Genocide Convention shift the balance of authority between the federal and state levels of government by transferring a subject of criminal law from state to federal jurisdiction?

No. Ratification of the Convention gives no new powers to the federal government and takes none from the states. In article I, section 8, clause 10, the Constitution gives Congress authority to "define and punish...offenses against the law of nations." No offense is more repugnant than genocide and none touches the community of na-

tions more deeply. Specific evidence that genocide is a crime against the law of nations arises from the Nuremberg trials and the accession to the Genocide Convention by 93 nations.

Federal authority is clear, but to emphasize federal concern for state authority, the implementing legislation proposed by the Senate Foreign Relations Committee stipulates that the federal government does not claim exclusive jurisdiction over the subject and does not intend to preempt the area from state action. Ratification of the Genocide Convention would no more remove this extreme form of homicide from state jurisdiction than United States ratification of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft removed the crime of theft from state authority.

"Our failure to ratify this treaty...has made us vulnerable to charges of insincerity, has in many parts of the world weakened our moral stance as our enemies skillfully propagandized this supposed insincerity, and has deprived us of the full politico-moral force and power that we could avail ourselves of in the use of international law as an instrument for our primary national interest and world peace, justice, and the rule of law. This failure can be redressed now by Senate ratification of the Genocide Convention."

PROFESSOR LEV E. DOBRIANSKY
*United States Ambassador to the Bahamas
 Chairman, National Captive Nations Committee*

Q • Might the treaty's article II definition of genocide as the perpetration of certain acts intended to destroy "a national, ethnical, racial or religious group in whole or in part" permit a prosecution for genocide for the murder of one or two people?

No. The "in whole or in part" language is important to make the treaty workable and the offense definable. If destruction of the whole group were required, perpetrators of genocide could go free if

even one member of the group survived. Jews, Armenians, and Cambodians, for example, each survived genocidal acts, but their oppressors nonetheless had committed the crime of genocide. The Senate Foreign Relations Committee has proposed that an **understanding** be attached to the ratification instrument stating that, "the U.S. Government understands and construes the words 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such' appearing in article II, to mean the intent to destroy a national, ethnical, racial, or religious group by the acts specified in article II in such manner as to affect a substantial part of the group concerned."

"I do not think it is appropriate for America, as the greatest and strongest democratic nation in the world, to shy away from such a narrowly worded document aimed at such a heinous international crime....If by ratifying the Convention we can help prevent or redress a single act of genocide anywhere in the world, we should not be easily deterred."

SENATOR ALAN K. SIMPSON

Q • Does the Convention's ban in article II on "causing serious...mental harm" to a people, or its criminalization in article III of "incitement to commit genocide," violate the Constitution's First Amendment guarantee of freedom of expression?

No. The Genocide Convention is in complete accord with the Constitution. The drafting history of the Convention shows that the "mental harm" clause was intended to apply only to physical injury to the brain, particularly through the forced use of mind-altering drugs, with the intention of destroying an ethnic, national, racial, or religious group. To reiterate this intended interpretation, the Senate Foreign Relations Committee has proposed that the following **understanding** be attached to the United States instrument of ratification: "the United States Government understands and construes the words 'mental harm' appearing in article II(b) of this Convention to mean perma-

ment impairment of mental faculties."

It is no accident that the "incitement" clause is constitutional. An early draft of article III prohibited all forms of public propaganda encouraging genocide. At American insistence, this was revised into the present language specifically to accommodate the free speech protections of the United States Constitution. The First Amendment of the Constitution does not, of course, protect incitement to commit a crime. As Justice Brandeis warned in *Whitney v. California*, 274 U.S. 357, 375-376 (1927), "the wide divergence between advocacy and incitement...must be borne in mind." Advocacy is protected even if it expresses prejudice and hate; incitement to a crime is not. In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the Supreme Court reaffirmed this rule when it held that the constitutional guarantee of free speech covers "advocacy...of law violation," but does not protect "advocacy [which] is directed to inciting...lawless action." Testifying in 1970 for the Department of Justice, then Assistant Attorney General William F. Rehnquist reported that freedom of speech as protected by the Constitution "could not be and...would not be" affected in any way by the terms of the Genocide Convention.

"It is damaging and counterproductive to withhold ratification any longer. The AAUW, therefore, exhorts the United States Senate to transform national conviction and rhetoric into action under international law."

AMERICAN ASSOCIATION OF
UNIVERSITY WOMEN

Q • Should the United States ratify the Genocide Convention even though it does not include political groups within its protection?

Yes. Article II lists national, ethnic, racial, and religious groups as protected under the Convention. The history of the treaty's negotiation reveals that the Soviet Union dropped its objec-

tion to including national groups in exchange for United States agreement that political groups would not be included. Thirty-six years after the treaty's negotiation, it is clear that achieving international agreement over the meaning of "political" is far more difficult than defining national, ethnic, racial, or religious. Determining the historical or ideological point that divides one political group from another is hard in scholarship and close to impossible in politics. And unlike national, ethnic, racial, or religious groups, there is only minimal objective or tangible evidence to circumscribe a political group.

The treaty might be stronger if it also extended protection to political groups, but fortunately, the plain prohibitions in the treaty cover most potential genocidal settings. National, ethnic, racial, and religious groups need the international recognition of a treaty devoted to their continued life, and the omission of political groups is not an adequate reason for the United States to refuse to extend this treaty's protection to the groups that are included. Their protection by the United States should not be blocked because Soviet intransigence barred this provision. Indeed, failure to ratify this treaty because of the omission of political groups would be a victory for Soviet obduracy. The United States, as a moral beacon for the world, should acknowledge the need to protect national, ethnic, racial and religious groups and should ratify the Genocide Convention. Once done, the United States as a party to the treaty could, under article XVI of the Convention, request that the treaty be revised to include genocide against political groups.

"The Genocide Convention seeks to achieve international agreement prohibiting the systematic annihilation of ethnic groups throughout the world....Many nations of the world have already approved [this treaty] and the United States is embarrassed not to have done likewise."

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE

"We join with all peoples in the quest for justice and the fashioning of institutions that secure the creation of those basic conditions that will assure the universal observance of human rights. We believe that the U.S. should...ratify the Genocide Convention without delay."

NATIONAL COUNCIL OF CHURCHES

Q • When the treaty is ratified, will its provisions thereupon become the law of the United States?

No. As plainly set forth in article V of the Genocide Convention, this treaty is not a self-executing agreement. The Convention has no domestic legal effect on the contracting parties until they "enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention." Furthermore, the Senate Foreign Relations Committee has proposed in the following declaration that passage of implementing legislation be part of the United States ratification process: "the U.S. Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in article V has been enacted." This treaty, therefore, will not become binding in the United States until appropriate amendments to the United States Code are considered by the Judiciary Committees of each House, passed by the Senate and the House of Representatives, and signed by the President.

This procedure fully complies with the long-standing American principle that a treaty cannot legislate criminal law within the United States, because the criminal jurisdiction of the federal courts must be mandated expressly by the Congress and the President through the legislative and not the treaty process. William F. Buckley has emphasized the importance of this process: "Article V...means that only Congress can pass laws that would give teeth to the Genocide Convention: and Congress is in our hands, not those of [a foreign nation]....We should identify ourselves as

approving the proposition that genocide is a violation of international law."

"It is no credit to our country that the U.S. is not one of the...nations which have approved the Convention on the Prevention and Punishment of the Crime of Genocide. Further delay by the Senate...will place our country in an entirely unnecessary and dangerously ambiguous position—playing into the hands of the slanderers of the U.S. at home and abroad."

AFL-CIO

Q. Will the Genocide Convention give the International Court of Justice or any other international tribunal any new or radical form of jurisdiction over the United States government, federal officials, or United States citizens?

No. Like some fifty treaties already ratified by the United States, dispute settlement under the Genocide Convention falls within the compulsory jurisdiction of the International Court of Justice. The International Court of Justice has no jurisdiction over individuals, regardless of whether they are government officials or just citizens, and it has no penal authority. Article IX of the Genocide Convention designates a restricted role for the International Court of Justice: it may only address questions of interpretation, application, or fulfillment of the treaty's provisions by any contracting party.

In addition, the Senate Foreign Relations Committee has recommended that an understanding be attached to the instrument of ratification to underscore the correct interpretation of the provision in article VI concerning trials of United States citizens accused of genocide committed outside the borders of the United States. It states that, "the U.S. Government understands and construes article VI of the Convention in accordance with the agreed language of the Legal Committee of the United Nations General Assembly that nothing in article VI shall affect the right of any state to bring

to trial before its own tribunals any of its nationals for acts committed outside the state."

"We cannot do moral battle against genocide with one hand tied behind our backs. Why permit communist nations, which all too often only give lip service to these obligations, to take the high moral ground in these debates? They have no right to it and we are foolish to abandon it to them. Ratification of the Genocide Convention would be an important moral statement and a strong diplomatic tool in the hands of the world's most powerful and influential country."

SENATOR WILLIAM PROXMIRE

Q. Is the Genocide Convention's extradition requirement consistent with United States extradition law?

Yes. Extradition is not a common or simple process. Extradition is based on treaties that the United States has negotiated with great care to ensure United States agreement with the specific laws covered by the treaty and the criminal trial procedures of the foreign country. No person subject to United States jurisdiction, whether an American citizen or not, can be legally taken from the United States to a foreign country to stand trial for a crime except under the terms of an extradition treaty. Article VII of the Genocide Convention calls for extradition by the contracting parties only "in accordance with their laws and treaties in force." The Genocide Convention itself is not an extradition treaty. There are no United States extradition treaties currently in force which include the crime of genocide. It would be the prerogative of the United States to seek to amend existing treaties or to negotiate new treaties to include genocide as an extraditable offense. Each treaty or amendment would be subject to the ratification process, thereby allowing the Senate and the President to determine those countries to which we would permit a person to be extradited and tried for genocide.

"The significance for the Church of defending and promoting human rights is rooted in our belief that the human person is made in the image and likeness of God, and because of that possesses a unique value in all of creation....We take this opportunity to again urge ratification of the Genocide Convention."

UNITED STATES CATHOLIC
CONFERENCE

Q: Could ratification of the Genocide Convention lead to spurious charges of genocide against the United States, its officials, or its citizens?

No. Ratification, to the contrary, would deter and refute such charges. The term "genocide" is embedded with emotion and often is used loosely and inappropriately. By setting forth the elements of the crime, the Convention defines genocide precisely and narrowly and adds objectivity to the issue. The treaty in its own terms rebuffs ill-formed or illegitimate claims of genocide. Rather than inviting charges, ratification will add credibility to government and private responses to such allegations, while enabling more effective actions against actual genocide as recently occurred in Cambodia.

Q: Would ratification of the Genocide Convention enhance American effectiveness in presenting our views and defending our principles in international forums?

Yes. Our unwillingness to ratify such a fundamental statement of human morality, particularly after we played a leading role in drafting the treaty and advocating its adoption, has made us a ready target for those who would disparage American commitment and credibility in the area of human rights. As stated by many United States representatives to the United Nations and reiterated most recently by Max M. Kampelman, United States Ambassador to the thirty-five nation follow-up conference on the Helsinki Accords held during 1983 in Madrid:

It would be extremely helpful to the United States internationally were we to ratify the Genocide Convention. It is ludicrous to provide the Soviet Union with a club with which to attack us, particularly since we abide by the Convention's provisions even without ratification, while the Soviets, who have ratified it, come close to violating its provisions.

"The Genocide Convention is a statement of conscience. It will serve as a symbol that humanity will never again tolerate religious or racial persecution. Morality requires its ratification."

GERALD KRAFT

President, B'nai B'rith International

Q • Is the act of genocide presently a violation
• of international law? Is such a prohibition
already binding upon the United States?

Yes. The Genocide Convention is one of the most widely accepted treaties in the world. The countries that have ratified the Convention comprise seventy-six percent of the world's population. A majority of the remaining population would fall under the protection of the treaty if it were ratified by the United States, Bangladesh, Indonesia, and Nigeria.

As a result of this near universal condemnation, genocide now is considered a crime under the customary law of nations, which is binding upon the United States regardless of ratification. The Restatement of the Foreign Relations Law of the United States (American Law Institute, 1982) states that it is a violation of customary international law if a state "practices or encourages genocide, fails to make genocide a crime or to punish persons guilty of it, or otherwise condones genocide." The Restatement reports that the definition of genocide found in the Genocide Convention is generally accepted for purposes of such customary international law.

The United States Congress already has recognized that genocide is a violation of international law. In legislation enacted in 1978, Congress stated that, "the United States should take steps to disassociate itself from any foreign government which engages in the international crime of genocide." 22 U.S.C. §2151.

United States ratification of the Genocide Convention would acknowledge existing international legal obligations, and ratification would strengthen United States leadership of the free world.

"Many of us have witnessed and personally suffered from this ultimate form of state-sponsored tyranny. The enduring scars and sorrow run deep in individuals and peoples who have survived genocide....U.S. ratification would help strengthen the moral principle of accountability for those governments that take rather than protect the lives of their citizens."

PROFESSOR ELIE WIESEL
*Chairman, United States
Holocaust Memorial Council*

PREPARED STATEMENT OF DAVIS R. ROBINSON

Mr. Chairman, Members of the Committee: I am pleased to appear before you on the Convention on the Prevention and Punishment of the Crime of Genocide, or the "Genocide Convention" as it is generally known.

The Executive Branch has now completed an extensive review of the Genocide Convention, including the questions raised in the past in connection with its consideration by the Senate of the United States. We undertook this review to examine anew whether ratification of this Convention continued to be in the best interest of the United States. I am pleased to inform you that having completed that review, this Administration believes that no legal impediment exists to the ratification of this important Convention, subject to the three understandings and one declaration which the Committee on Foreign Relations itself reported in 1976.

The Genocide Convention can be briefly summarized: The Convention defines the act of genocide, confirms that it is a crime under international law, obliges States which are Parties to enact legislation to make genocide a crime under national law, and specifies that the Parties pledge themselves to grant extradition in accordance with their laws and treaties in force. For the purpose of extradition, genocide shall not be considered a political offense. The Convention also provides that disputes between Parties relating to the Convention's interpretation, application or fulfillment shall be submitted to the International Court of Justice.

The main thrust of the Convention is to require Parties to outlaw genocide within the structure of their own legal systems. Thus, in addition to the Senate's providing advice and consent to its ratification, the Congress must enact legislation which would add to the criminal code a new crime called genocide and set forth criminal penalties for its commission.

Articles II and III of the Convention provide the contours of what such legislation would contain. Article II defines genocide to be any one of five types of acts committed with "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such." The five types of acts are: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group. Article III of the Convention provides for the punishment of genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempted genocide and complicity in the commission of genocide.

Since its submission to the Senate by President Truman in 1949, the Genocide Convention has been considered by this Committee on at least seven occasions. The Committee has heard from distinguished scholars concerning whether significant legal impediments existed to ratification of this Convention. I will not today attempt to restate comprehensively these legal discussions. Instead I would like to discuss briefly two major legal issues which have previously been considered in testimony before this Committee.

It has been argued that genocide is not a proper subject for treaty making and is essentially a subject within the domestic jurisdiction of sovereign states. The United States is already party to numerous multilateral treaties which deal with diverse matters of concern to the international community, including in the human rights area treaties on slavery and refugees. Recent actions by the Senate, for example in giving advice and consent to the Convention on the Taking of Hostages, reflect the wide range of legitimate topics for international concern. In the present case, 96 countries by ratifying or acceding to the Genocide Convention have indicated their belief that the subject of genocide is a proper concern of nations. International human rights are properly a subject of international concern. Accordingly, I believe the Genocide Convention is clearly within the treaty making powers of the United States.

It has also been argued that ratification of the Genocide Convention might force the United States at some future date to extradite Americans for trial abroad on trumped up charges of genocide. I want to allay any apprehensions on this point. The careful definition of genocide contained in the Convention, as clarified by the first two proposed understandings, and the procedural safeguards built into our extradition process will prevent this from occurring.

The definition of genocide in the Convention requires the presence of specific elements, in particular a specific intent and the commission of one or more defined overt acts.

Under the Convention, genocide requires for its commission the specific "intent to destroy the group in whole or in part, as such." The Administration supports the

clarification in the first understanding proposed by the Foreign Relations Committee in 1976 to the effect that this intention must be one to destroy the group by specified acts "in such manner as to affect a substantial part of the group concerned." This distinguishes the international crime of genocide—i.e. acts taken with intent to destroy groups—from the domestic crime of homicide—i.e. acts taken with the intent to destroy individuals. The second understanding proposed by the Committee and supported by the Administration specifies that "mental harm" means permanent impairment of mental faculties.

Under Article VII of the Convention the Parties pledge to grant extradition of persons charged with genocide "in accordance with their laws and treaties in force." Thus the United States would not be required to surrender an individual to any nation if, for example, that country fails to make a showing of probable cause or the United States finds the request for extradition to have been politically motivated. Under the terms of the Convention, once it has entered into force, there shall, however, be no defense to extradition on the grounds that the crime was a "political" one.

It should be emphasized that the Convention does not purport to be an extradition treaty itself. Furthermore, no person could be extradited from the United States for trial in a foreign country on a genocide charge unless we have a bilateral extradition treaty with that country making genocide an extraditable offense. No U.S. treaty presently in force does so. Six recent treaties (those with Costa Rica, Ireland, Italy, Jamaica, Sweden, and Thailand) to which the Senate recently gave advice and consent, but which have not entered into force, contain a general formula under which extradition would lie for offenses that are crimes punishable in both the United States and the other country by more than a specified period of imprisonment. For all but these six treaties, amendment of United States bilateral extradition treaties to include genocide will be required before they would afford a basis for extradition as a result of United States ratification of the Genocide Convention. Furthermore, no existing bilateral extradition treaty, whether the older type which lists specific crimes or the more recent type containing the formula, will cover genocide unless and until the United States Congress adopts the necessary implementation legislation, to execute this non-self-executing treaty. In this connection, the proposed declaration states that the United States will not deposit its instrument of ratification to the Convention until after such legislation has been enacted. Thus in every case further Congressional action would be required before genocide would become an extraditable offense. This would include passage of implementing legislation and, in addition, in all but the six extradition treaties I mentioned, Senate approval of amendments to treaties.

I should also note that our extradition treaties contain several procedural safeguards which apply regardless of the extraditable offense. For example, under each bilateral extradition treaty the state requesting extradition must produce sufficient evidence to persuade both a U.S. court and the Secretary of State that there is probable cause to believe the person sought committed the offense with which he is charged.

Finally, the negotiating history of the Convention, confirmed in the third proposed understanding, makes clear that trial for genocide may also occur in the country of which the defendant is a national. In this regard, the implementing legislation should enable U.S. authorities to prosecute a genocide offense committed by United States nationals outside the United States as an alternative to responding affirmatively to a request for extradition. As previously noted, as the 1976 Foreign Relations Committee declaration supported by the Administration makes clear, the United States will not deposit the instrument of ratification to the Convention until after such implementing legislation is enacted.

I have not attempted to canvas in detail the other legal issues which have been debated before the Committee in the past during its consideration of the Genocide Convention. Previous discussions before this Committee by representatives of the Office of the Legal Adviser and the Department of Justice have already addressed these questions comprehensively.

This concludes my statement. I would be pleased to answer any questions you may have after Mr. Olson has completed his statement.

(Genocide Convention, hearing, Committee on Foreign Relations, U.S. Senate, 98-2, September 12, 1984, pp. 47-48.)